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IN THE

Supreme Court of the United States

October Term, 1963

No. 253

UNITED STATES OF AMERICA, *ex rel.*
HERMAN FREDERICK MARKS,

Petitioner,

against

P. A. ESPERDY, as District Director of the Immigration and Naturalization Service, New York District, United States Department of Justice,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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P. A. ESPERDY, as District Director of the Immigration and Naturalization Service, New York District, United States Department of Justice,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, the relator-appellant-appellee below, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled habeas corpus proceeding on April 9, 1963.

Opinions Below

The opinion of United States District Judge Cashin for the Southern District of New York is reported at 203 F. Supp. 389. An earlier decision of United States District Judge Levet of that same Court in a related aspect of this proceeding is reported at 198 F. Supp. 40. The opinion of Circuit Judge Waterman of the United States Court of Appeals for the Second Circuit, which affirmed in part and reversed in part the determination of Judge Cashin, is reported at 315 F. 2d 673.

Jurisdictional Statement

The order of the Court of Appeals herein is dated April 9, 1963.

The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254(1).

Questions Presented

Petitioner is a native-born American who has never renounced his American citizenship [*cf.* § 349[1] (a) (6), (7)], never taken an oath of allegiance to a foreign state [*cf.* § 349(a)(2)], and never acquired the citizenship or nationality of another state [*cf.* § 349(a)(1)]. Nor is it charged that he ever voted in a foreign election [*cf.* § 349 (a)(5)], or served in the employ of a foreign state of which he was a national [*cf.* § 349(a)(4)]. It was held below, however, that petitioner forfeited his American citizenship, rendering him stateless and deportable from the United States, because he was "a member of the Armed Forces of Cuba from January 2nd, 1959, to May, 1960", a charge presumably based upon the statutory provision that citizenship is lost by "entering, or serving in, the armed forces of a foreign state" without the written authorization of the Secretaries of State and Defense[2] [§ 349(a)(3)].

The issues raised in this first instance of review by this Court of an adjudication of denationalization, statelessness, and deportability of an American-born are the following:

1. Whether § 349(a)(3), as here applied, is a penal statute and therefore unconstitutional because it imposes

[1] Sections 241, 242 and 349 of the Immigration and Nationality Act of 1952 are fully set forth at pages 4-7 and are hereinafter referred to as "§ 241", "§ 242", and "§ 349" respectively.

[2] While § 349(a)(3) refers to entry or service in the armed forces of a foreign state, the charge here is membership in the Cuban Armed Forces.

the cruel and inhuman punishment of statelessness prohibited by the Eighth Amendment (*Trop* v. *Dulles*, 356 U. S. 86) and because it imposes such punishment without affording the procedural safeguards guaranteed by the Fifth and Sixth Amendments (*Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144).

2. Whether § 349(a)(3), as here applied, is an unconstitutional impairment of the petitioner's status as a citizen of the United States pursuant to Amendment XIV, § 1, in that he has never renounced his sole American citizenship by declaration or act.

3. Whether the administrative arrest and administrative detention of the petitioner by the respondent for a period of approximately nine months in connection with petitioner's possible deportation is an improper and unconstitutional exercise of the judicial power which is vested solely in the judiciary pursuant to Article III.

4. Whether petitioner's service in the Cuban Rebel Army from January 2, 1959 to May, 1960, which initiated pursuant to the order and directive of a powerful Cuban authority and continued subject to punishment for desertion or counter-revolutionary activity, was voluntary within the meaning of *Nishikawa* v. *Dulles*, 356 U. S. 129.

5. Whether the petitioner's service in the Cuban Rebel Army after January 2, 1959, during a period when that organization was not designated as an "armed force", and was neither engaged in nor preparing for military activities, but was explicitly assigned to and carrying out a "civic and not [a] * * * military calling", constituted service in the armed forces of a foreign state within the meaning of § 349(a)(3).

6. Whether petitioner, if he is an alien, is deportable as an excludable alien because when he returned to this

country in July, 1960, and before his alienage had been competently determined or established, he did not obtain the entry documents required of an alien.

7. Whether petitioner, if he is an alien, is deportable as an excludable alien, pursuant to the statutory provision which renders excludable aliens convicted of crimes involving moral turpitude, because the petitioner had been convicted of such a crime in 1952 while he was a citizen.

Applicable Constitutional and Statutory Provisions

1. United States Constitution, Amendment XIV, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

2. Immigration and Nationality Act § 349(a)(3), Act of June 27, 1952, c. 477, Title III, Ch. 3, § 349(a)(3), 66 Stat. 267, 8 U. S. C. A. 1481(2)(3) (referred to herein as "§ 349(a)(3)"):

> "(a) From and after the effective date of this chapter a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by—
>
> (3) entering, or serving in, the armed forces of a foreign state unless, prior to such entry or service, such entry or service is specifically authorized in writing by the Secretary of State and the Secretary of Defense."

3. Immigration & Nationality Act § 241(a)(1), Act of June 27, 1952, c. 477, Title II, Ch. 5, § 241(a)(1), 66 Stat. 204, 8 U. S. C. A. 1251(a)(1) (referred to herein as "§ 241(a)(1)"):

> "(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;"

4. Immigration & Nationality Act § 212(a)(9), (20), Act of June 27, 1952, c. 477, Title II, Ch. 2, § 212(a)(9), (20), 66 Stat. 182, 8 U. S. C. A. 1182(a)(9), (20) (referred to herein as "§ 212(a)(9)" and "§ 212(a)(20)"):

"(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

(9) Aliens who have been convicted of a crime involving moral turpitude"

(20) Except as otherwise specifically provided in this chapter, any immigrant who at the time of application for admission is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this chapter, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality, if such document is required under the regulations issued by the Attorney General pursuant to section 1181(c) of this title;"

5. Immigration & Nationality Act § 242, Act of June 27, 1952, c. 477, Title II, Ch. 5, § 242, 66 Stat. 208, 8 U. S. C. A. 1252 (referred to herein as "§ 242"):

"(a) Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. Any such alien taken into custody may, in the discretion of the Attorney General and pending such final determination of deportability, (1) be continued in custody; or (2) be released under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (3) be released on conditional parole".

"(b) A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present.

No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this chapter, as the Attorney General shall prescribe. Such regulations shall include requirements that—

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section. In any case in which an alien is ordered deported from the United States under the provisions of this chapter, or of any other

law or treaty, the decision of the Attorney General shall be final."

"(c) When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained, released on bond in an amount and containing such conditions as the Attorney General may prescribe, or released on such other condition as the Attorney General may prescribe. If deportation has not been practicable, advisable, or possible, or departure of the alien from the United States under the order of deportation has not been effected, within such six-month period the alien shall become subject to such further supervision and detention pending eventual deportation as is authorized in this section."

Statement of the Case

There have been many controverted issues of fact in this proceeding. Petitioner's view of the controverted aspects of the record is reserved for the argument which follows. At this point the facts not contradicted in the record are summarized:

Marks was born in Milwaukee, Wisconsin, on August 1, 1921 (App. 119a). In 1958 he went to Cuba (App. 141a). The Cuban civil war was in progress at that time. Marks ultimately joined the rebel forces led by Castro and attained the rank of captain in the Rebel Army (App. 145a). Although eligible to do so as a result of his service in the Rebel Army (App. 263a-267a), Marks never acquired Cuban nationality (App. 119a, 120a, 140a) or otherwise renounced his American citizenship, and promptly protested notice that his American citizenship was in question because

of his service in the Rebel Army (App. 127a-128a, 282a-284a).

Sometime in November, 1958, Marks was obliged to obtain medical treatment for injuries he sustained, and it was necessary for him to go to Florida for that purpose (App. 148a-150a). Marks returned to Cuba during the first week of January, 1959 (App. 150a); in the interim, the rebel forces had occupied Havana, Batista had fled, and the hostilities had ended.

Upon his return to Cuba, Marks was directly assigned by Che Guevara, one of the leading revolutionaries in the rebel forces, to perform security duties at La Cabana, a prison in Havana (App. 152a-155a). Thereafter, starting in June, 1959, Marks served in various other assignments in his capacity as a captain in the Rebel Army, but his duties and authority were diminished as he increasingly engaged in anti-communist activity (App. 122a-126a). That activity finally reached such proportions that by May, 1960, Marks, fearing his imminent arrest as a counter-revolutionary by the Cuban secret police, escaped from Cuba and ultimately arrived in the United States in July, 1960 (App. 132a-134a).

On January 25, 1961, Marks was interviewed by two investigators of the Immigration and Naturalization Service at his apartment. According to Marks, they stated they were interested in information and cooperation which might "help them in dealing with the Cuban situation" (App. 135a). Marks was brought to the offices of the Service that night where, after approximately five hours of interrogation (App. 67a-70a), he signed a sworn statement dealing with his alleged activities in Cuba (App. 59a-61a). The statement was drafted in the handwriting and language of one of the investigators (App. 241a-246a), and was signed at 2:00 A. M. on January 26 (App. 67a). Immediately following the signing of the statement, Marks was

told, for the first time, that he was under arrest, presumably as a deportable alien (App. 73a, 78a, 138a). Marks was thereupon removed to the maximum security section of the Federal Detention Headquarters; he was already in such detention when he was served, at 7:10 P. M. on January 26, with an administrative warrant of arrest (App. 66a-67a) issued by the Attorney General or his representative [see § 242(a)].

On January 26, 1961 charges were served on Marks by the Service for the institution of deportation proceedings under § 242. The charges stated that pursuant to § 349(a)(3), Marks was not a citizen or national of the United States because he was a "member of the armed forces of Cuba from January 2, 1959 to May 1960"; the charges concluded that Marks was an excludable and, therefore, deportable alien [see § 241(a)(1)] on the ground that he had been convicted on January 11, 1952 for the commission of a crime involving moral turpitude [see § 212(a)(9)], and on the further ground that, at the time he re-entered the United States from Cuba on July 22, 1960, he did not have the entry papers required of an alien [see § 212(a)(20)] (App. 17a-21a).

Hearings on the described charges were commenced before a Special Inquiry Officer of the Service on January 26, 1961, and several further hearings were held before him up to April 6, 1961. During those hearings, by letter dated March 16, 1961, counsel for Marks requested of the Attorney General of the United States that Marks be released on bail or parole pending the proceedings so that the relator could participate in the preparation and presentation of his defense (App. 21a-23a). This request was denied by the Attorney General by letter dated March 27, 1961 (App. 23a-24a).

On May 31, 1961, almost two months after the conclusion of the hearings before the Special Inquiry Officer, that Officer sustained the charge that Marks was a de-

portable alien (App. 7a). Marks, still in custody, thereupon appealed to the Board of Immigration Appeals, which, on August 2, 1961, dismissed the appeal and sustained the decision of the Special Inquiry Officer (App. 7a).

Before the decision of the Board, Marks instituted a habeas corpus proceeding to obtain his release from the maximum security detention in which he was being held. The writ was denied by Judge Levet, who found that Marks was first obliged to exhaust his administrative remedies before a writ could issue, and bail was denied (198 F. Supp. 40).

The instant habeas corpus proceeding, brought pursuant to 28 U. S. C. A. 2241(c)(3), was commenced by order to show cause dated August 21, 1961 (App. 3a-4a). The petition alleged that Marks is not an alien or deportable and that his detention is illegal on constitutional, statutory and factual grounds (App. 5a-13a). By stipulation of counsel the proof on the issues raised in the habeas corpus proceeding was to consist of the testimony which was adduced at the hearing before the Special Inquiry Officer, subject, however, to all objections made at that hearing and to the rulings of the Court upon those objections (App. 30a-32a).

In the instant habeas corpus proceeding, the petitioner renewed his application for bail. Judge Cashin fixed bail at $10,000 (App. 33a-36a), and later reduced the bail to the sum of $5,000. On October 18, 1961 the petitioner was released under the prescribed bond. Until his release, Marks had been continuously detained for almost nine months in maximum security at the New York Federal Detention Headquarters since the inception of the administration proceeding on January 26, 1961, although he has been charged with no crime or criminal activity, and

although, following the ruling of the Board of Immigration Appeals, a Justice Department "spokesman" publicly "expressed doubt * * * that Marks would be deported, because of the difficulty of finding a country that would accept him" (App. 24a-25a).

On March 29, 1962 Judge Cashin granted the writ, finding that the "proposed continued detention of the relator is * * * unlawful" for the reason that while the petitioner, according to the District Court, had lost his native-born American citizenship, no valid ground for deportation had been shown (203 F. Supp. at p. 317). The District Court considered that the petitioner was not excludable as an alien, and therefore not deportable, for failure to procure, at the time of his entry to the United States in July, 1960, entry documents required of aliens since there had been no competent judicial determination of petitioner's alienage prior to July, 1960; similarly, the District Court held that petitioner's conviction in 1952, at a time when he was a citizen, did not render him excludable or deportable in his status as an alien.

Following this determination by the District Court, and to the present time, the petitioner's bail has been reduced to $1,000 and he has been released on such bail pursuant to stipulation and order as prescribed by Rule 49(3), Rules of the United States Supreme Court.

On April 9, 1963, the Second Circuit, in an opinion written by Judge Waterman, held that "[a]lthough we find great force in the constitutional arguments presented by relator's counsel, we are constrained by the superior authority of *Perez* v. *Brownell*, 365 U. S. 44 * * * (1948), to affirm the determination of alienage" (315 F. 2d, at p. 675). In addition, the Court of Appeals concluded that the denationalizing effect of petitioner's service in the Cuban rebel forces was immediately contemporaneous with such service so as to establish his alienage prior to his entry to the

United States in July, 1960, and his failure to obtain documents required of entering alien immigrants caused the petitioner to be deportable as an excludable alien.[3] Accordingly, the Circuit Court reversed and dismissed the writ.

REASONS FOR GRANTING THE WRIT

I

§ 349 (a) (3), as here applied, imposes cruel and inhuman punishment without affording the procedural safeguards guaranteed by the Fifth and Sixth Amendments. The ruling below sustaining the constitutionality of § 349 (a) (3) as so applied is in conflict with applicable decisions of this Court.

Expatriating legislation resulting in statelessness has never been sustained by this Court. In *Trop* v. *Dulles*, 356 U. S. 86, expatriation pursuant to § 349(a)(8) for desertion in time of war was held the imposition of an unconstitutional penalty, four members of the majority of the Court holding that the resultant statelessness amounted to cruel and inhuman punishment. And in *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, where expatriation pursuant to § 349(a)(10) for draft evasion caused a condition of statelessness, the statute was held unconstitutional as the imposition of punishment without compliance with the procedural requirements set by the Fifth and Sixth Amendments for the conduct of criminal prosecutions. Accord-

[3] The Court of Appeals explicitly refrained from reaching or deciding the question whether Marks was also excludable and deportable on the grounds of his conviction for a crime involving moral turpitude. Because of petitioner's release on bail, the Court of Appeals also explicitly reserved decision on the question whether petitioner's detention, based solely on his prospective deportation [§ 242(a)], was unlawful in that no country would accept him as a deportee and he was in fact not deportable.

ingly, if § 349(a)(3), as here applied, is penal in nature and leaves the objects of its application stateless, it is unconstitutional, whether for the cruelty and inhumaneness of the "drastic, the truly terrifying" penalty of statelessness (Brennan, J., concurring in *Mendoza-Martinez*, *supra*, at p. 187) or because of the absence of a "prior criminal trial and all its incidents, including indictment, notice, confrontation, jury trial, assistance of counsel, and compulsory process for obtaining witnesses" (*Mendoza-Martinez*, *supra*, at p. 167). It is, therefore, decisive that, as we shall show, § 349(a)(3) is penal in purpose and application.

§ 349(a)(3) does not merely expatriate, it also creates statelessness. Prior to 1940 service in the armed forces of a foreign state was not by itself expatriating; from 1940 to 1952 such service in a foreign state caused loss of American citizenship if the soldier was a national of that state, thereby presumably leaving him with his other nationality intact; only since the enactment of § 349(a)(3) in its present form in 1952 can a person of sole American citizenship be caused to lose that sole citizenship by foreign military service (see pp. 15-18, *infra*). § 349(a)(3) does, therefore, result in statelessness in its application, and such is its uncontradicted effect upon the petitioner (App. 5a); the District Court correctly observed that as a result of the impact of § 349(a)(3) upon the petitioner, "he is a stateless alien" (203 F. Supp., at p. 397).

In addition to imposing a condition of statelessness, § 349(a)(3), in its application to petitioner, has other consequences associated with penal legislation. § 349(a)(3), in conjunction with the laws governing exclusion and deportation of excludable aliens [§§ 212, 241 and 242], provides the alleged authorization for the administrative arrest and approximately nine months detention of the petitioner described at pages 8-11, *supra*. The validity of this procedure is challenged at a later point in this brief. But

the process of arrest and imprisonment in the enforcement of the denationalizing effect of § 349(a)(3) is here material to the understanding of that statute's operative aspects as a penal statute.

The administrative arrest and imprisonment of Marks was for the duration of the administrative proceeding on the issue of his deportability,—a detention period which included almost two months after the conclusion of hearings for the Service hearing officer to render a decision and another four months for determination by the Board of Immigration Appeals. The petitioner's request to the United States Attorney General for release was denied (App. 21a-23a), and release by habeas corpus was likewise denied pending exhaustion of administrative remedies (198 F. Supp. 40). And, as matters now stand, if the ruling below is sustained, "the Attorney General shall have a period of six months" from the final order of this Court "within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained", and "[i]f deportation has not been practicable, advisable, or possible * * * within such six-month period the alien shall become subject to such further supervision and detention pending eventual deportation as is authorized in this section" [§ 242(c)].

§ 349(a)(3), as here applied, therefore exposes the petitioner to an unlimited period of "detention pending eventual deportation", particularly as it has been alleged and not denied that Marks cannot be deported to Cuba and no other nation will accept him as a deportee (App. 10a-11a); the proof discloses that a Justice Department representative publicly "expressed doubt * * * that Marks would be deported" (App. 25a). If it should prove that some nation will accept the petitioner as a deportee, and he is deported as an excludable and, therefore, deportable alien, Marks

will have been banished into exile from this country forever.

Expatriation, statelessness, arrest, almost unlimited "further supervision and detention", and banishment are the substance of penal rather than regulatory legislation. The penal consequences flowing from the application of § 349(a)(3) are no incidental by-product of a non-penal regulatory purpose or pattern. For the legislative history of § 349(a)(3) discloses that the underlying and exclusive legislative purpose in the case of persons of sole American citizenship was to exact loss of that American citizenship as a mode of retribution; Americans who serve in a foreign military force,—except where authorized to do so by the Secretaries of States and Defense,—are deemed by the Congress to have demonstrated a lack of allegiance to the United States and unworthy of retaining American citizenship. We shall show that legislation so purposed and structured is invalid for various reasons; here we emphasize the retributive and, therefore, penal objective of a statute which represents an effort by Congress to wrest American citizenship from those the Congress believed to have repudiated American allegiance by service in the armed forces of a foreign state.

Prior to 1940 such service was no cause for loss of citizenship (see pp. 24-25, *infra*). In 1933 President Roosevelt, at congressional request (86 Cong. Rec. 11943), established a cabinet committee composed of the Attorney General and the Secretaries of State and Labor to revise and codify the nationality law. The cabinet committee report, following 5 years of study, proposed, *inter alia*, various new grounds for denationalization. These new provisions were stated to be

> "* * * merely intended to deprive persons of American nationality when such persons, by their own acts, or inaction, show that their real attachment is to the foreign country and not to the United

States." (H. R. Comm. Print. Pt. 1, 76th Cong., 1st Sess., p. VII.)

The nationality code proffered by the cabinet committee included loss of citizenship for entering or serving in the armed forces of a foreign state (*Id.*, at pp. 66-67). It was contemplated that one who

> "* * * voluntarily enters, or continues to serve in, the army of a foreign state, thus offering his all in support of such a state, should be deemed to have transferred his allegiance to it." (*id.*, at p. 67.)

In 1940 congressional hearings were conducted on the report and proposed code. Mr. Flournoy, Assistant Legal Adviser of the State Department, testifying in support of the above proposal, said that

> "* * * it does not seem reasonable that a person should give himself up and risk his life for the good of a foreign state and remain a citizen of the United States, although it may be reasonable to provide for recovering citizenship readily in such cases." (Hearings on H. R. 6127, 76th Cong., 1st Sess., p. 131.)

H. R. 9980, 76th Cong., 1st Sess., incorporated the proposed nationality code, with changes not here material. The bill was briefly debated and passed in the House in September, 1940. (86 Cong. Rec. 11965.) The Senate Committeee on Immigration, however, rejected the Houses's formulation of denationalization for service in the armed forces of a foreign state, and confined such denationalization to the dual-national who serves in the army of a country of which he is a citizen. (Sen. Report No. 2150, 76th Cong., 1st Sess., p. 3.) The Senate revision had the effect of shifting the congressional purpose from coping with the problem of loss of allegiance to the problem created by the "conflict between the two nations over the military service of the dual-national." (Pp. 38-39, United

States Brief in *Perez* v. *Brownell*, 356 U. S. 44.) Ultimately, the bill passed as amended by the Senate (86 Cong. Rec. 12817-8, 13250) and became the Nationality Act of 1940 (54 Stat. 1137), the military service denationalization provision being § 401(c) thereof (54 Stat. 1168-9).

In 1950 the Senate Judiciary Committee, of which Sen. McCarran was chairman, proposed that denationalization for service in a foreign army not be conditioned upon dual-nationality or any other factor. (Sen. Report No. 1515, 81st Cong., 2nd Sess., p. 749.) It was pointed out that under the Nationality Act of 1940 denationalization for foreign military service occurred only when the soldier was a citizen of that foreign country or where that foreign country required an oath of allegiance as a condition to military service. This was considered to be an undesirable lack of uniformity.

> "The subcommittee feels that the provisions covering the loss of nationality through service in the armed forces of a foreign country should be uniform and should not be dependent upon foreign law, and therefore is recommending changes in this subsection designed to effect such uniformity." (*id.*, at p. 749.)

By 1952 the same Senate committee under the same chairman proposed the bill which eventuated in the present § 349(a)(3) as part of the Immigration and Nationality Act of 1952. (Sen. Report No. 1137, 82nd Cong., 2nd Sess., p. 46.) There does not appear to have been any congressional discussions or debate as to the effect of statelessness resulting from the extension of foreign military service denationalization from dual-nationals to persons of sole American citizenship. (See, *e.g.*, 2 U. S. Code Cong. & Admin. News (1952), p. 1742.) In 1952, then, Congress finally enacted in § 349(a)(3) the provision recommended 14 years earlier by the cabinet committee. In doing so,

Congress indicated that it intended to equate those who did not with those who did take an oath of allegiance upon entering a foreign army. (Sen. Report No. 1515, 81st Cong., 2nd Sess., p. 749.) Congress thereby adopted the reasons which motivated the earlier recommendation, *i.e.*, denationalization of those who repudiate American allegiance. (See Note, 54 Columbia Law Rev. 932, 942.)

The legislative history of § 349(a)(3) evidences no purpose other than that of retribution in the statute's application to persons of sole American nationality. While the Congress was anxious to free the United States from the problems arising where an American national of dual-nationality asks for United States intervention to avoid foreign military service in the other country of which he is a national and a resident (see Tsiang, Expatriation in America Prior to 1907, p. 99), there is no indication in that legislative history that the Congress, in enacting § 349(a)(3), was concerned with such problems in cases involving single rather than dual nationality.[4] The American with sole American citizenship in a foreign army has either been impressed into such service against his will or has joined of his own will; in the former case Congress did not intend to foreclose American intervention and in the latter Congress did not expect American intervention for the avoidance of service to be invoked. As appears from the

[4] The object of the original statute, § 401(c) of the Act of 1940, in denationalizing, only one who was a national of the foreign state in whose army he was serving, was, as indicated, to avoid conflicting claims of sovereignty over an American national who had been conscripted, over his objections, into the army of his alternate nationality and had invoked the protection of the American authorities. Curiously enough, in such a case the service would be considered involuntary under *Nishikawa* v. *Dulles*, 340 U. S. 129, so that in the one instance involving problems in the conduct of our foreign affairs which the Congress had in mind in enacting legislation to denationalize for service in a foreign army, denationalization is now not effected.

review of the legislative history of § 349(a)(3), individual allegiance and not the conduct of foreign affairs is what preoccupied the Congress in formulating § 349(a)(3) so far as it applied to those of sole American citizenship.

The District Court, relying heavily upon *Perez*, found the legislative purpose in § 349(a)(3) to be the avoidance of international political embarrassment said to be potentially occasioned the United States by individual Americans serving in foreign armies. Whatever the validity of such a finding of legislative intent in *Perez*,—a case which did not involve statelessness and therefore did not confront the issue whether the statute was penal in nature,—there is here no foundation for a like finding. For § 349(a)(3) is not confined to "embarrassing" service in the military of an enemy or unfriendly nation, but would, as here applied, automatically denationalize even for "non-embarrassing" service in the army of an ally if such service has not been explicitly authorized by the Secretary of State and the Secretary of Defense.

The legislative history of § 349(a)(3) does not contain the slightest suggestion of congressional concern that the act of an American individual would, to our embarrassment, be attributed to the entire nation or construed as national policy. If the problem had occurred to the Congress, no doubt techniques much simpler, more effective, and less destructive of individual rights than the imposition of statelessness could have been suggested to demonstrate the independence of the nation from the acts of a private individual (see *Kennedy* v. *Mendoza-Martinez*, *supra*, at p. 185). And, if cognizant of the problem, the Congress nevertheless insisted upon utilizing the device of statelessness and potential banishment, the penal purpose of the Congress would be established since such a device would be "excessive in relation to the [allegedly non-penal] * * * purpose assigned" (*Kennedy* v. *Mendoza-Martinez*, *supra*, at p. 169).

It is, in the end, unthinkable that the Congress intended, or is empowered, to "disown" an American citizen in order to evidence American disclaimer of responsibility for his politically distasteful action. With the possible exception of *Perez*, there is no precedent for such a mode of expressing American policy. If the technique may be fairly considered as the intention and within the constitutional powers of the Congress, we can see no discernible limit to its application; all manner of individual conduct "embarrassing" to this country in its international political relations, from racial discrimination against representatives of foreign countries to unfair competitive business practices abroad, would thereby be cause to denationalize native-born Americans. The unlimited scope of logical extensions of the doctrine of regulation by denationalization militates against imputing to the Congress any intent to initiate such a doctrine. Accordingly, speculation as to some remote, never expressed congressional purpose to dissociate national American policy from private individual action by expatriation and banishment cannot serve to avoid the conclusion that § 349(a)(3), as here applied, is "concerned solely with inflicting effective retribution upon" Americans serving in foreign armies (*Kennedy* v. *Mendoza-Martinez*, *supra*, at p. 182); so understood § 349(a)(3), as here applied, is unconstitutional under the rulings of this Court in *Trop* and *Mendoza-Martinez*.

II

The petitioner never renounced or intended to renounce his American citizenship or allegiance. In such circumstances § 349 (a) (3) is inapplicable. Any other construction of § 349 (a) (3) would render it unconstitutional. The determination below is in conflict with the rulings of this Court or raises important questions of constitutional law to be settled by this Court.

The record here is devoid of any evidence of renunciation of, or any intent to renounce, his American citizenship by Marks. The proof discloses only the intention to retain American allegiance and citizenship. Although Marks was eligible for Cuban citizenship because he had risked his life in the revolution (App. 263a-267a), Marks never applied for or received such citizenship (see App. 119a-120a, 140a). It is also uncontroverted that promptly upon receipt of State Department notice of loss of citizenship while still in Cuba, Marks first protested the action to the American Consulate (App. 127a-128a), and then publicly announced his desire to retain and fight for his citizenship (App. 282a-284a).

There is no incompatibility between petitioner's activities in the Rebel Army and his allegiance to the United States. In his initial association with the Rebel Army, Marks was part of an effort to rid the Cuban people of an oppressive tyranny (App. 141a-145a); and in his association with the early post-revolutionary activities of the Rebel Army, Marks was part of an effort to effect the social and political reconstruction of Cuba (App. 121a-126a, 176a-178a); in both of these endeavors the petitioner was connected with a movement which had the sympathy and well-wishes of the United States as evidenced by the following extracts from the April 4, 1961 report of our State Department:

> "* * * The hemisphere rejoiced at the overthrow of the Batista tyranny, looked with sympathy on

the new regime, and welcomed its promises of political freedom and social justice for the Cuban people." (App. 284a-285a)

"The character of the Batista regime in Cuba made a violent popular reaction almost inevitable. The rapacity of the leadership, the corruption of the Government, the brutality of the police, the regime's indifference to the needs of the people for education, medical care, housing, for social justice and economic opportunity—all these, in Cuba as elsewhere, constituted an open invitation to revolution.

"When word arrived from the Sierra Maestra of the revolutionary movement headed by Dr. Fidel Castro Ruz, the people of the hemisphere watched its progress with feeling and with hope.

"The Cuban revolution could not, however, have succeeded on the basis of guerrilla action alone. It succeeded because of the rejection of the regime by thousands of civilians behind the lines—a rejection which undermined the morale of the superior military forces of Batista and caused them to collapse from within.

"This response of the Cuban people was not just to the cruelty and oppression of the Batista Government but to the clear and moving declarations repeatedly made by Dr. Castro concerning his plans and purposes for post-revolutionary Cuba." (App. 285a-286a)

"Dr. Castro, in short, promised a free and democratic Cuba dedicated to social and economic justice. It was to assure these goals that the rebel army maintained itself in the hills, that the Cuban people turned against Batista, and that all elements of the revolution in the end supported the 26th of July Movement.

"It was because of the belief in the honesty of Dr. Castro's purposes that the accession of his regime to power on January 1st, 1959, was followed within a single week by its acceptance in the hemisphere—

a recognition freely accorded by nearly all the American republics, including the United States.

"For a moment the Casto regime seemed determined to make good on at least its social promises. The positive programs initiated in the first months of the Castro regime—the schools built, the medical clinics established, the new housing, the early projects of land reform, the opening up of beaches and resorts to the people, the elimination of graft in government—were impressive in their conception; no future Cuban Government can expect to turn its back on such objectives." (App. 286a-287a)

"* * * The rebel army and the 26th of July Movement expressed the profound and passionate desire of the Cuban people for democracy and freedom, a desire sanctified in the comradeship and sacrifice of the revolutionary struggle. * * *" (App. 290a)

We do not, of course, mean to suggest that Fidel Castro's subsequently disclosed amenability to communist influence and, perhaps, domination is at one with the interests of the United States. But even this development emphasized Marks' continued adherence to his American allegiance. For it was his testimony, nowhere contradicted in the record, that he resisted and actively fought communists and communist doctrine wherever he encountered them in the Rebel Army, that his militantly expressed and implemented anti-communism resulted in his frequent transfers and his demotion, and that his anti-communist activities finally caused him to come under the surveillance of the secret police (DIER) so that he was obliged to flee from Cuba to save his life (App. 123a-126a, 132a-134a).

In this same connection, the petitioner testified, and without any contradiction, that while serving at La Cabana (App. 123a) and then later while serving at Principe (App. 126a-127a), Marks accorded very considerable cooperation to members of the American consulate and the F.B.I.—

cooperation which sometimes involved dangerous breaches of duty (App. 127a). The absence of any evidence to challenge the petitioner's testimony concerning his anti-communism and cooperation with the American authorities is persuasively corroborative of that testimony in view of the obvious availability of the named American authorities and the demonstrated availability to the Service at the hearings of many Cuban refugees with direct and personal knowledge of the history of the Rebel Army.

If the record here is compared with *Kawakita* v. *United States*, 343 U. S. 717, where the most abject and slavish loyalty to the Japanese cause was not deemed antithetical to American allegiance, it becomes clear that nothing the petitioner did while in Cuba can fairly be held to demonstrate renunciation of, or an intent to renounce, his American citizenship.

Of course the act of joining and serving in Cuba in the Rebel Army cannot, without more, be conclusively presumed an intent to renounce American citizenship or allegiance. Almost since the beginning of the nation it has been a crime to enlist in the United States for foreign military service (18 U. S. C. A. 959), but the prohibition has not extended to those, as the petitioner, who left the country to enlist abroad. *Wiborg* v. *United States*, 163 U. S. 632; *United States* v. *Hertz*, 26 Fed. Cas. No. 15357 (C. C. E. D. Pa.); *United States* v. *O'Brien*, 75 F. 900 (C. C. N. Y.). Our early doctrine, which generally foreclosed individual renunciation of American citizenship, also meant that foreign military service did not effect loss of such citizenship. *McIlvaine* v. *Coxe's Lessee*, 8 U. S. (4 Cranch) 209; see also Tsiang, *op. cit. supra*, at pages 38-41, 56-61, 66-67. But even after the Congress, in the Act of 1868, permitted voluntary renunciation of American citizenship, it was considered in the administration of the Act that "voluntary entrance by a person of sole American citizenship into for-

eign military or naval service was not considered as an evidence of expatriation". Tsiang, *op. cit. supra*, at page 102.

A similar appraisal of the relationship between American allegiance and service in a foreign army was made by the President's Commission on Immigration and Naturalization when it pointed out:

> "Service in foreign armies by American citizens can be motivated by many purposes entirely consistent with allegiance to the United States. Thus, before entry of the United States into World War II, many Americans volunteered for service in the armies of Canada, Great Britain, and other nations later allied with the United States. Other young Americans serve in foreign armies because of a spirit of adventure; still others may serve as technicians." (President's Commission, Whom Shall We Welcome, p. 243.)

In such circumstances an irrebuttable presumption that service in a foreign army is renunciation of American citizenship is contrary to experience and, therefore, beyond the power of the Congress.

> "Of course a citizen has the right to abandon or renounce his citizenship and Congress can enact measures to regulate and affirm such abjuration. But whether citizenship has been voluntarily relinquished is a question to be determined on the facts of each case * * *. Although Congress may provide rules of evidence for such trials, it cannot declare that such equivocal acts as service in a foreign army, participation in a foreign election or desertion from our armed forces, establish a conclusive presumption of intention to throw off American nationality. Cf. *Tot* v. *United States*, 319 U. S. 463. Of course such conduct may be highly persuasive evidence in the particular case of a purpose to abandon citizenship." [*Nishikawa* v. *Dulles*, 356 U. S. 129, 139 (Black, J., concurring); *cf. Kennedy* v. *Mendoza-Martinez*, *supra*, at pp. 215 ff. (dissent, Stewart and White, JJ., presumption of intent

to evade draft based upon fact of departure unconstitutional)]

See also:

Bailey v. *Alabama*, 219 U. S. 219;
Lindsley v. *Natural Carbonic Gas Company*, 220 U. S. 61;
McFarland v. *American Sugar Ref. Co.*, 214 U. S. 79;
Manley v. *Georgia*, 279 U. S. 1;
Western & Atlantic R. R. v. *Henderson*, 279 U. S. 639;
Heiner v. *Donnan*, 285 U. S. 312;
Morrison v. *California*, 291 U. S. 82.

It is, therefore, clear that the petitioner has neither actually nor presumptively renounced his American citizenship or allegiance. The issue which remains is whether such renunciation is a prerequisite to the applicability of § 349(a)(3). That question was not reached in *Nishikawa* v. *Dulles*, 356 U. S. 129, the single case involving denationalization for foreign military service decided by this Court.[5] We believe that the Constitution, because it "is silent about the permissibility of involuntary forfeiture of citizenship rights" (*Kennedy* v. *Mendoza-Martinez*, *supra*, at p. 159), forbids such forfeiture and that this Court must interpolate the requirement of renunciation, as a condition to a finding of expatriation causing statelessness, if § 349 (a)(3) is to be sustained.

The unqualified right to American citizenship of the native-born is guaranteed by the 14th Amendment (§ 1, cl. 1). On the other hand, there is to be found in the Con-

[5] One District Court held the predecessor to § 349(a)(3) unconstitutional because it included non-renunciatory action. *Kiyokuro Okimura* v. *Acheson*, 99 F. Supp. 587 (D. Haw.), *remanded* 342 U. S. 899, *aff'd*, 111 F. Supp. 303.

stitution no express power or authority to denationalize a native-born.

> "The Fourteenth Amendment, while it leaves the power, where it was before, in Congress, to regulate naturalization, has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship." *United States* v. *Wong Kim Ark*, 169 U. S. 649, 703.

Of course, what the Congress may not take away, the citizen may voluntarily renounce. "[A] change of citizenship cannot be arbitrarily imposed, that is, imposed without the concurrence of the citizenship" (*Mackenzie* v. *Hare*, 239 U. S. 299, 311); "Expatriation is the voluntary renunciation or abandonment of nationality and allegiance" (*Perkins* v. *Elg*, 307 U. S. 325, 334; see also, *Matter of A*, 2 I & N Dec. 304, 307). Accordingly, the usual and most unexceptionable mode of expatriation of an American-born citizen is by a voluntary renunciation of that citizenship.

It has, however, also been held that native-born American citizenship can be lost by a dual-national who has by word or action explicitly or implicitly opted for his alternate nationality. *Mackenzie* v. *Hare*, 239 U. S. 299; *Savorgnan* v. *United States*, 338 U. S. 491; *Perez* v. *Brownell*, 356 U. S. 44. But no case has held that sole American citizenship can be lost, and a status of deportable statelessness imposed, except by explicit renunciation or by action which can conclusively be deemed renunciatory of American allegiance.[6] Of course, acts which may be deemed sufficiently

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[6] *Perez* v. *Brownell*, *supra*, sustained denationalization under the predecessor to § 349(a)(5) for voting in a foreign election without regard to the existence of any renunciatory intent. But *Perez* was a dual-national who had manifested his intention to retain his non-American citizenship (see Note, 31 Fordham L. Rev. 373, 377-388), so that the case did not involve statelessness and the opinions in *Perez* do not discuss the constitutional consequences of that status. Moreover, *Perez* was an action for a declaratory judgment to determine status as a citizen and, therefore, did not reach the issue of deportability. 356 U. S. at page 65.

demonstrative of an election of allegiance by a dual-national do not necessarily establish voluntary renunciation of sole American allegiance resulting in statelessness. For the opinion of Chief Justice Warren in *Trop* v. *Dulles*, *supra*, eloquently demonstrated that the imposition of a condition of statelessness must, constitutionally, be considered and treated differently from other more conventional forms of governmental action such as denaturalization or criminal penalties when he pointed out that statelessness is

> "the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself. While any one country may accord him some rights, and presumably as long as he remained in this country he would enjoy the limited rights of an alien, no country need do so because he is stateless. Furthermore, his enjoyment of even the limited rights of an alien might be subject to termination at any time by reason of deportation. In short, the expatriate has lost the right to have rights." (356 U. S., at pp. 101-2.)

These remarks are closely modeled after the earlier observation that

> "* * * [N]o description of expatriation as the loss of particular rights is adequate. For expatriation represents a loss of the right to have rights—loss of membership in an organized community capable of guaranteeing any rights at all. The individual becomes a stateless person, with no right to stay anywhere on the face of the earth. Every 'sovereign' State has the right to expel aliens from its borders, and modern States including the United

States do so freely. Neither has he a right to leave any country; no State is obliged to issue a passport to him, and no State is obliged to admit him without one. Moreover, if a stateless person is a victim of a 'denial of justice' by the governmental authorities of a State, he has no recourse whatever. Under contemporary international law neither the governments of individual States nor international organizations are considered to have legal standing to intervene in his behalf. In summary, the stateless person has no rights, either intranational or international, which are inalienable. He exists at the mercy of the State in which he resides." (64 Yale Law J., at pp. 1190-1191.)

"* * * Since the 1920's, when statelessness was first recognized as a world problem, every international conference on nationality has explicitly condemned legislation which results in the creation of stateless persons. The recognized treaties are unanimous in their disapproval of statutes which denationalize individuals without regard to whether they possess two nationalities. And the Universal Declaration of Human Rights strongly reaffirms the right of every individual to retain a nationality." *id.*, at 1195.)

We have already shown that the statutory history, meaning, and application of § 349(a)(3) provide support for the constitutionally required inquiry into Marks' retention of his American allegiance (see pp. 15-18, *supra*). For § 349(a)(3), as here applied to persons of sole American nationality, is the product of the congressional purpose to take American citizenship from those believed to hold no or a diluted allegiance to this country. The interpretative experience of the post-1940 legislation dealing with denationalization for foreign military service tends to confirm the materiality of the factual inquiry whether such service is instanced by an adherence to or a renunciation of American allegiance.

In the Matter of S, 1 I & N Dec. 476, concerned a dual-national, a citizen of Canada and of the United States, who registered for the Canadian draft and sought to enlist in the Canadian Army. The Service held that loss of American citizenship did not necessarily follow. In the cited case, Prof. Freund, an eminent authority on constitutional law, noted "that the fact that the applicant registered for the draft in Canada is not a voluntary abandonment of American citizenship" (p. 483), and the then Attorney General Clark agreed, saying:

> "Under the circumstances of the war it may well be that his registration and effort to enlist are to be attributed to a motive to join a war consistent with the interests of the United States." (p. 484)

In *Shibata* v. *Acheson*, 86 F. Supp. 1 (S. D. Cal), where it appeared that an American conscripted into the Japanese Army maintained his intention to remain an American citizen and to return to the United States, service in the foreign army did not result in denationalization. Again, in *Scardino* v. *Acheson*, 113 F. Supp. 754 (D. N. J.), an American conscripted into the Italian Army during the war, who took the required Italian oath of allegiance, was not denationalized when it was found that he had been unwilling to fight American soldiers. See also, *Dos Reis ex rel Ca[illegible]ra* v. *Nicolls*, 161 F. 2d 860 (C. A. 1).

A perceptive analysis of the foreign military service cases up to 1952 concluded that:

> "If he [the soldier] manifested by overt acts prior, during or subsequent to induction, a continuing allegiance to the United States the military service is deemed involuntary." (Note, 54 Columbia Law Rev. 932, 941).

The same analysis found that the effect of the enactment of § 349(a)(3) in 1952 was to strengthen the foregoing conclusion:

> "In view of the change in the function of this provision [§ 349(a)(3)], the courts are likely to

> expatriate for service in a foreign army only where the motives for enlisting were inconsistent with allegiance to the United States." (*id.* at p. 942.)
>
> "* * * the courts have implicitly drawn a distinction between dual nationality and dual allegiance. In the latter area, expatriation has been refused if the actor's motives were not indicative of foreign attachment." (*id.*, at p. 943.)

Judicial power to construe § 349(a)(3) so as to interpolate an intention to renounce American allegiance in cases involving persons threatened with statelessness by denationalization cannot be disputed. Interpolation of a specific and actual intent in order to save a federal statute from unconstitutionality is an established practice. See *e.g.*, *Screws* v. *United States*, 325 U. S. 91. Similarly, where federal legislation impinges upon cherished and fundamental constitutional rights, the legislation will, wherever possible, be read to be limited to the precise action or intention which may be constitutionally regulated, although language to such effect is absent from the statute. See, *e.g.*, *Dennis* v. *United States*, 341 U. S. 494. Such a reading of § 349(a)(3) is particularly authorized in view of the doctrine that in cases which involve "the purpose of depriving one of the precious right of citizenship the facts and the law should be construed as far as is reasonably possible in favor of the citizen." (*Schneiderman* v. *United States*, 320 U. S. 118, 122; quoted with approval in *Nishikawa* v. *Dulles*, 356 U. S. 129, 134-135.) Thus it has been consistently acknowledged that, for constitutional reasons, § 349(a)(3) must be read to require clear, convincing and unequivocal proof that the expatriating act was voluntary (see *Nishikawa* v. *Dulles*, *supra*; *Matter of A*, 2 I & N Dec. 304), although the law contains no language expressly imposing such an evidentiary requirement.

The denaturalization and denationalization cases in this Court amply evidence the judicial practice of interpolat-

ing standards and quanta of proof calculated to reconcile the crushing judgment of loss of American citizenship with constitutionally permissible legislative powers and objectives. (See, *e.g.*, *Baumgartner* v. *United States*, 322 U. S. 665; *Bridges* v. *Wixon*, 326 U. S. 135; *Knauer* v. *United States*, 328 U. S. 654; *Schneiderman* v. *United States*, *supra*; *Nishikawa* v. *Dulles*, *supra*.) The general "presupposition of our law to resolve doubts * * * against the imposition of a harsher punishment * * *" (*Bell* v. *United States*, 349 U. S. 81, 83) has special applicability in exclusion and deportation cases where the Court has refused to "assume that Congress meant to trench on [an alien's] freedom beyond that which is required by the narrowest of several possible meanings of the words used." *Fong Haw Tan* v. *Phelan*, 333 U. S. 6, 10; see also *Barber* v. *Gonzales*, 347 U. S. 637, 642-643; *Delgadillo* v. *Carmichael*, 332 U. S. 388, 391.

United States v. *Minker*, 350 U. S. 179, affords an illuminating illustration of the latitude of construction available in this case. § 235(a) of the Immigration and Nationality Act of 1952 [8 U. S. C. A. 1225(a)] permits immigration officers to subpoena and question "witnesses" on any matter relevant to the enforcement of the Act. The Service invoked § 235(a) as authority to question a naturalized citizen to determine if cause existed for his denaturalization. It was held that, although it could not be denied that the word "witnesses" could "readily be deemed to cover" the citizen under investigation (350 U. S., at p. 186), § 235(a) would not be so read on the grounds that "Congress has not provided with sufficient clarity that the subpoena power granted by § 235(a) extends over persons who are the subject of denaturalization investigations * * *" (*id.*, at p. 190). This manner of statutory construction was explicitly based upon the special considerations which underlie cases involving loss of citizenship (*id.*, at pp. 187-8).

No previous cases more impellingly evoked the exercise of the foregoing principles and practice. Never previously has this Court been confronted with the prospect of adjudging a native-born American stateless and deportable. Unless expressly required, no statute should be construed to impose such a condition contrary to the intent of the subject of that status. Nationality is society's principal gravitational force; without it the individual is in the limbo of perpetual and omniprevalent alienage—he is an alien, literally a stranger, everywhere in the world. To be stateless is to be without the protection of any state anywhere. Previously, we associated statelessness with the tragic dilemma of those former German citizens rendered aliens in their own country by Hitler's racial laws. The question here is whether a similar obnoxious condition can constitutionally be imposed upon a native-born American who never chose to relinquish or renounce or replace his American citizenship.

The proposal to denationalize and deport the petitioner, notwithstanding the total absence of any proof of an intention of expatriation, may occasion no shock to some who conclude that the unprecedentedly harsh treatment of Marks, including the devastating judgment of statelessness, warrants no sympathy in view of his role in post-revolutionary Cuba. But rendering the petitioner stateless for action not amounting to voluntary and intentional expatriation threatens us all. If Marks' citizenship may be taken away from him because of politically offensive behavior which is not incompatible with allegiance to the United States and American citizenship, then none of us is safe from the risk of banishment. It is for this reason that we have urged the construction of § 349(a)(3) to be found under this point.

Neither Lafayette nor Kosciusko repudiated his native nationality by assisting the American Revolution. Ameri-

cans risked their lives throughout the 19th Century in support of the cause of national independence in Europe. Even before our entrance into World War I, Americans, conscious of and loyal to their American allegiance, fought on the side of our future allies. Again, during the Spanish Civil War, many Americans chose to demonstrate their faith and belief in the principles of democracy by fighting actively with the established Spanish Republic against the insurgency of Franco. And during World War II, thousands of Americans decided, before our government was ready to do so, that they would commit their safety and even their lives to resist German aggression.

The current of present events and the prospect of future ones do not lessen the impulse of Americans to support their political convictions by taking part in foreign struggles where freedom is in issue. Deference to this impulse will come not only from organized official action such as the Peace Corps or our government assistance to other nations in the form of money, materials, and personnel, but also from individuals. It surely cannot be the intention to strip Americans of citizenship if they should decide to enlist in the cause of Israel if that country should be invaded by the Arab powers, or to fight to support any of the new African nations where threatened by a power intent upon restoring such nation to its previous colonial status.

The argument under this head involves transcending issues of political freedom and the integrity of American citizenship. A country capable of recognizing that Princess Grace Kelly did not forfeit her American citizenship by assuming the role of a reigning sovereign of a foreign country should be just as capable of recognizing that Herman Marks did not lose his American citizenship because he participated in the post-revolutionary police and reconstruction activities of the Cuban Rebel Army. The common principle in the two cases is that citizenship of a native-

born American is not something which can be taken away, but is a status which can be lost only by a knowing and voluntary renunciation. This principle underlies the proper construction of § 349(a)(3) pursuant to the Constitution and the applicable authorities.

For the reasons indicated, the convincing proof that the petitioner intended not to renounce, but to retain his American citizenship and allegiance, and that his activities in Cuba and the Cuban Rebel Army were compatible with American allegiance, preclude a finding of expatriation, statelessness, and deportability.

III

The administrative arrest of petitioner, and his subsequent detention based upon his alleged deportability without any prior competent judicial adjudication of his alienage were improper and unconstitutional exercises of the judicial power by an administrative agency. The issue here raised is one of great constitutional importance and should be settled by this Court.

Marks' detention started on the evening of January 25, 1961. At 8:00 P. M. of that evening, two Service investigators came to Marks' apartment (App. 62a, 67a). From that time until his release on bail almost nine months later he was, at all times, in the custody of the Service. While there is conflict in the testimony on this score, it is fair to conclude that after the Service investigators started to question Marks, and particularly after he was brought from his home to the Investigations Section of the Service's office sometime between 9:30 and 10:00 o'clock at night for interrogation which lasted almost five hours, Marks was not at liberty to leave the custody of the Service. (See App. 61a-81a, 134a-139a.) Marks was thus detained by the Service although, admittedly, no grounds for arrest existed at the time (App. 73a-74a).

At the end of the interrogation, a sworn statement in the handwriting of one of the investigators was signed by Marks. The statement referred to Marks' service in the Cuban Rebel Army from 1958 to May, 1960. It was conceded that much of the language in the statement was composed by the investigator (App. 80a-81a, 245a-246a) and, in at least one respect, based on nothing which Marks told the scribe of the statement (App. 239a-245a).

Promptly upon the execution of his statement, Marks was told he was under arrest and placed in jail. No writ of arrest had been issued at the time; an administrative writ of arrest was not served on Marks until 7:10 P. M. of January 26, 1961 (App. 66a-67a), almost 24 hours after the questioning began, more than 20 hours after he was brought to the headquarters of the Service, and 17 hours after he was admittedly taken into custody. Such an arrest would be unlawful if made in the course of criminal law enforcement and the statement taken would be inadmissible. *McNabb* v. *United States*, 318 U. S. 332; *Mallory* v. *United States*, 354 U. S. 449. Administrative arrest, not based upon a judicial writ, must surely be subject to no lesser strictures or standards.

Even if Marks' arrest had been attended by greater deference to the required proprieties, it was unlawful since not pursuant to judicial writ issued on probable cause supported by sworn proof, and not based upon the commission of any overt or probable criminal conduct. Service arrest warrants, once required to be based upon sworn statements as to probable cause (see former 8 U. S. C. A. 282; Rule 22, Reg. of Secy. of Labor under Immigration Act of 1917), need no oath or affirmation concerning probable cause (see 8 CFR 242.1 ff.). But the Fourth Amendment contemplates a judicial warrant of arrest based upon "probable cause, supported by oath or affirmation," not an administrative writ of arrest where the arresting agency

rather than an independent judicial officer or magistrate determines the right to arrest. The Fourth Amendment commits the authority to issue a warrant of seizure to "the informed and deliberate determinations of magistrates" and not "the officers or others who may happen to make arrests" (*United States* v. *Lefkowitz*, 285 U. S. 452, 464). Issuance of writs of arrest, under the Fourth Amendment, must be based upon findings to be made "* * * by a neutral and detached magistrate instead of being judged by the officer * * *" (*Johnson* v. *United States*, 333 U. S. 10, 14).

Abel v. *United States*, 362 U. S. 217, expressly reserved decision on the issue of the constitutionality of administrative arrests in deportation proceedings because not adequately raised below. No such waiver obtains here. For the petitioner has urged the issuance of the writ upon the ground that his detention, without judicial warrant and without probable cause based upon criminal conduct, is unlawful because it violates the Fourth and Fifth Amendments.

The petitioner's lengthy administrative detention, following upon his administrative arrest, was likewise unlawful because in derogation of the judicial function. The respondent's power to detain is strictly as an incidence of his power to deport, and both depend upon the detainee's alienage. § 242, the statute which authorizes the detention of an alien preparatory to his deportation, vests the power of such detention in the Attorney General. But neither § 242 nor any other statute has authorized the Attorney General to settle issues of citizenship, deportability and detention in the case of American-born persons. For whatever the extent of the Attorney General's power to rule on the deportability of aliens, when native-born American citizenship is shown or plausibly claimed, the issue of the existence of American citizenship is exclusively a matter for the judiciary.

Mr. Justice Frankfurter observed that the decisions of the Supreme Court "* * * requir[e] judicial as against administrative adjudication of the issue of citizenship in a deportation proceeding * * *" (*United States* v. *Minker*, 350 U. S. 179, 188). The cases sustain this view:

> "Jurisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus a denial of an essential jurisdictional fact * * *. To deport one who so claims to be a citizen, obviously deprives him of liberty * * *. It may result also in loss of both property and life; or of all that makes life worth living. Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law." [*Ng Fung Ho* v. *White*, 259 U. S. 276, 284-285 (Brandeis, J.)]
>
> "[If petitioner had claimed American citizenship] and had supported the claim by substantial evidence, he would have been entitled to have his status finally determined by a judicial, as distinguished from an executive, tribunal." (*United States ex rel. Bilokumsky* v. *Tod*, 263 U. S. 149, 152.)
>
> "* * * [I]n the event an alleged alien asserts his United States citizenship * * * and supports his claim by substantial evidence, * * * he [is] entitled to a trial *de novo* of that issue in the district court." (*Kessler* v. *Strecker*, 307 U. S. 22, 34-35.)

The exclusivity of the judicial power to determine the issue of plausibly claimed American citizenship is evidenced by the line of authorities since *Ng Fung Ho* v. *White*, *supra*, which declared the doctrine of exhaustion of administrative remedies inapplicable in such cases.

> "That relators had the right to have the question of their citizenship determined in advance of deportation proceedings, under the claim here made is settled by the authorities."
>
> *Ex parte Kazan*, 5 F. 2d 243, 244 (S. D. Texas, 1925) (Hutcheson, J.).

Accord:

United States ex rel. Gonzalez v. *Kirk*, 39 F. 2d 246 (S. D. Texas, 1930);
Ex parte Gros, 123 F. Supp. 718 (N. D. Cal., 1954).

See also:

Wong Wing Foo v. *McGrath*, 196 F. 2d 120, 122 (C. A. 9, 1952) (Denman, C. J.) ("Nothing in the * * * text [of the statute authorizing proceedings to establish citizenship] suggests that the 'action' * * * is to succeed some prior administrative proceeding." The action was one "which plaintiff could have brought as soon as the immigration officials refused to accept his passport and to allow him to enter.")

United States ex rel. Chin Ming Mow v. *Shaughnessy*, 118 F. Supp. 490, 493 (S. D. N. Y., 1953) (Conger, J.) ("There is nothing in § 503 [former statute authorizing proceeding to establish citizenship] which indicates that an action of this type is to succeed some prior administrative proceeding.")

The foregoing considerations have led Mr. Justice Black to note in a concurring opinion that the issue "whether citizenship has been voluntarily relinquished is a question to be determined on the facts of each case after a judicial trial in full conformity with the Bill of Rights" (*Nishikawa* v. *Dulles*, 356 U. S. 129, 139).

If, as seems clear, the petitioner was entitled to a judicial hearing on the issue of his citizenship, it is no answer here that he has ultimately received such a hearing. Entitlement to a judicial hearing may, in cases involving property rights, be properly deferred until the completion of some other prior form of proceeding. *Phillips* v. *Com-*

missioner, 283 U. S. 589, 595-597. One commentator has observed, however:

> "Is it sufficient if relief is forthcoming via this circuitous route? In cases where personal liberty is involved, the answer would seem plainly to be *no*." [Cooper, Administrative Agencies and the Courts, p. 85 (emphasis in original)].

And where, as here, the judicial hearing is preceded by the imposition of the very injury to be reviewed, *i.e.*, detention pending deportation in this case—the deferment of the constitutionally guaranteed judicial hearing to the conclusion of the prior executive proceeding is in derogation of that guarantee. Cf. *Columbia Broadcasting System* v. *United States*, 316 U. S. 407, 423-425; *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51 (App. D. C.), *cert. den.*, 347 U. S. 990; Admin. Pro. Act § 10 (d), 5 U.S.C.A. 1009(d). The established right to a judicial determination of citizenship in habeas corpus for the purpose of settling the citizen's right not to be deported or detained pending deportation is obviously not satisfied by a procedure where a summary administrative arrest and nine months' detention pursuant to administrative determination precedes the constitutionally required hearing.

Marks was entitled to have the issue of his citizenship determined judicially. § 349(a)(3), as here applied over his timely objection, denied him that right until after his arrest and lengthy detention. Marks was thereby *pro tanto*, denied the right to a judicial determination of whether he was an alien subject to such administrative arrest and detention.

IV

The finding of alienage here is contrary to the applicable decisions of this Court.

The argument under this heading reviews the evidence and the law to determine whether Marks has been denationalized under § 349(a)(3). Three preliminary observations are in order:

(1) The prior administrative decisions on the issues under review are entitled to no weight. *Perez* v. *Brownell*, 356 U. S. 44, 47; *Kessler* v. *Strecker*, 307 U. S. 22, 34-35; *United States ex rel. Medeiros* v. *Watkins*, 166 F. 2d 897 (C. A. 2); *Frank* v. *Rogers*, 253 F. 2d 889, 892 (App. D. C.); *Chin Hoy* v. *United States*, 293 F. 750 (C. A. 6).

(2) Marks' *prima facie* case on the issue of his citizenship arises by dint of his conceded American birth (*Nishikawa* v. *Dulles*, *supra*, at p. 133; *Perez* v. *Brownell*, *supra*, at p. 47), and thereupon "The Government must prove the act of expatriation on which the denial [of citizenship] was based by '"clear, unequivocal, and convincing" evidence which does not leave "the issue in doubt".' *Gonzales* v. *Landon*, 350 U. S. 920; see *Schneiderman* v. *United States*." *Perez* v. *Brownell*, *supra*, at p. 47. This evidentiary standard is applicable to cases involving denationalization for foreign military service. *Nishikawa* v. *Dulles*, *supra*.

(3) This Court must re-examine for itself, and independent of the limited scope of review provided by Rule 52(a), Fed. R. Civ. Pro., whether the Government has carried the prescribed burden of proof. *Baumgartner* v. *United States*, 322 U. S. 665, 670-671; *Chaunt* v. *United States*, 364 U. S. 350, 353.

A.

The finding that the petitioner's service in the Cuban Rebel Army after January 2, 1959 was voluntary is in conflict with *Nishikawa* v. *Dulles*, 356 U. S. 129

Marks entered the Cuban Rebel Army in 1958 during the Cuban revolution and some time prior to January 2, 1959. But since the Rebel Army could not, prior to the overthrow of the Batista government, be deemed "the armed forces of a *foreign state*", Marks' activities in the Rebel Army prior to January 2, 1959 are not cited as part of the amended charges. Consequently, the issues here necessarily relate to the nature and effect of Marks' activities in the Rebel Army after January 2, 1959, rather than his entry into the Rebel Army some time earlier.

Nishikawa v. *Dulles*, 356 U. S. 129, conditions denationalization for foreign military service upon the most convincing proof that such service was voluntary. Where entry into a foreign military force is the result of conscription, or where service therein is enforced by laws against desertion, then there has been a failure to establish the requisite voluntariness (*Matter of A*, 2 I & N Dec. 304; 40 Opin. Att'y Gen. 553; *Matter of R*, 3 I & N Dec. 470).

In *Matter of A*, *supra*, a native American, born of Mexican parents, voluntarily joined the Mexican Army prior to the time when entry for service in a foreign army was grounds for expatriation. He continued to serve until a time after the effective date of the legislation providing for denationalization where one serves in the army of a foreign state of which he is a national. The Board of Immigration Appeals, as approved by the Attorney General, held the service to be involuntary and no grounds for expatriation, notwithstanding the original voluntary enlistment, in view of the Mexican laws against and punishment for desertion.

Similarly in 1947, the then Attorney General Clark advised Secretary of State Marshall that where an American citizen under the age of eighteen entered the armed forces of a foreign state of which the minor was also a national, and then continued in such foreign armed forces after the age of eighteen

> "My conclusion is that continued service after the age of 18, whether the service began prior thereto by voluntary enlistment or by involuntary induction, is not alone sufficient to cause loss of United States nationality" (40 Opin. Att'y Gen. 553).

Again, in *Matter of R, supra*, a German-American inducted into the German Army while under eighteen who served until after the age of nineteen, and took an oath of allegiance to Germany in 1944, was held not to have been expatriated. The original entry being unexceptionable due to his age, the respondent in that case was deemed not responsible for his continued service since it was not shown that he could have obtained a discharge when he passed the age of eighteen and that he knew he could obtain such a discharge but failed to do so.

From the foregoing it is settled that the voluntariness of Marks' service in the Rebel Army must be appraised as of January 2, 1959 and thereafter. His original enlistment and service prior to January 2, 1959, not being in the armed forces of a foreign *state*, are concededly no grounds for expatriation. The question which remains, therefore, is whether the respondent has proven convincingly that Marks' activity in the Rebel Army *after* January 2, 1959 was voluntary.

The term "voluntary" has a special and artful meaning in matters pertaining to loss of citizenship, and requires some discussion before reviewing the proof on that score.

One competent analysis of the term "voluntary" in expatriation cases suggests that it means action which re-

nounces American allegiance. Note "'Voluntary': A Concept in Expatriation Law", 54 Columbia Law Review 932. If so, then clearly Marks' actions were not voluntary. But it is unnecessary to go so far as to equate "voluntary" with renunciation of allegiance. It is sufficient that, in expatriation cases, involuntary does not mean acts performed solely because of coercion or duress; action is involuntary if the threat of punishment or injury contributes substantially to the action.

Foreign military service, performed pursuant to conscription, is involuntary even if the individual performing such service might have done so in the absence of coercion or duress. [See, *e.g.*, *Matter of A*, 2 I & N Dec. 304; see also *Podea* v. *Acheson*, 179 F. 2d 306 (C. A. 2); *Pandolfo* v. *Acheson*, 202 F. 2d 38 (C. A. 2).] No expatriation case involving foreign military service has required a showing that the individual would not have served in the foreign army if not for conscription. The rule is, apparently, that so long as some form of compulsion exists, then foreign military service is involuntary unless it clearly and affirmatively appears that that service was wholly volitional and the compulsion played no part.

Moreover, the compulsion involved need not be solely the effect of a conscription law. *Stipa* v. *Dulles*, 233 F. 2d 551 (C. A. 3), recognized that economic compulsion of any substantial degree renders service in a foreign government involuntary for purposes of denationalization. In *Kenji Kamade* v. *Dulles*, 145 F. Supp. 457 (D. Cal.) (Weinfeld, J.), it was held that a Japanese-American who took a position as a school teacher in Japan was not expatriated thereby under § 349(a)(4) (which expatriates for working for a foreign government). The teacher's need to earn a livelihood was held to render such employment involuntary. Again, in *Insogna* v. *Dulles*, 116 F. Supp. 473 (D. D. C.), it was held that an American citizen of Italian birth who

took a job with the Mayor of an Italian city was not expatriated. A job taken for purposes of subsistence did not constitute voluntary employment. In none of the cited cases does it clearly appear that the citizen could find no other means of sustenance.

The question whether petitioner's alleged military service was voluntary, as that term has been construed in the denationalization cases, ultimately involves an assessment of three principal events in the period following January 2, 1959:

1. Marks' return to Cuba in the early part of January, 1959;

2. Marks' resumption of activities in the Rebel Army shortly after his return in January, 1959;

3. Marks' continuance in the Rebel Army from January, 1959 to May, 1960.

A review of each of these circumstances, when measured by *Nishikawa*, makes it clear that Marks' alleged military service after January, 1959 was, as a matter of law, not voluntary.

1. Marks' return to Cuba in early January, 1959.

In the early part of November, 1958, Marks left combat duty to obtain medical treatment for wounds received to his knee and ankle (App. 148a). Unable to obtain proper medical attention for him in Cuba, the Rebel Army arranged for Marks to fly to Key West, Florida, for such treatment (App. 148a-149a). Sometime in the first week of January, Marks left Key West or Miami to return to Havana (App. 149a-150a).

During the period that Marks was out of Cuba, Batista fell, Castro took over Havana, and the military phase of the revolution was at an end. When Marks returned to Cuba there were no longer any hostilities in progress.

Marks testified, without contradiction, that when he returned to Havana he considered that the "war is over" and that he was returning "for a reunion with friends that I fought with during the revolution" (App. 150a). It was the uncontradicted testimony of Marks that he had no intention, when he returned to Cuba, to return to military service since that activity was already at an end. The Court can, perhaps, best gain insight into Marks' motives for returning to Cuba by extensive quotation from his testimony:

> "Q. Now, I'm going to ask you, Mr. Marks, to reconstruct for the Hearing Officer as fully and as completely as you can, your state of mind in the early part of January 1959 relative to your return to Cuba? A. Well, when I left Cuba with wounds in my leg, which I previously had told, that it was severely infected, upon leaving the group, I had received orders that upon completion of cure of the wounds I was to report back to Che Guavara. After the wounds were healed, which were paid for by the Revolutionary—revolution, and they also took care of me and took great care with great jeopardy to other people in getting me out of Cuba. And so I felt—I have thought of it as very thoroughly since Monday—and I wish to stress that I did have an obligation because they did pay for my medical attention, they did get me money, of assistance, during the time of recuperation. So, therefore, I did have an obligation to report back. But when I —in January the war was over, there was peace— I considered at that time that it was all finished, and I would go back and have a complete reunion with the men, who I had fought with. Also I wish to bring out a point which hasn't been brought out before—as the Court probably knows, I have been poor all my life. I have never had nothing—too much, and according to the rules of the Revolutionary government that through the agrarian re-

form, their land would be given—unused lands or government owned land would be given to the poor. And as Fidel also stated in the mountains, that men serving in the Revolutionary government would have a preference, a priority in receiving said tokens of land, if they had nothing. I have dealt slightly with agriculture and through information and seeing what is possible in Cuba in the reform of agriculture, I found agriculture could be a very lucrative income, and it was my intent to get a portion of this land and also begin in setting up my own farm and plantation, where I could have secure and permanent income. As many Americans who have land and property in Cuba also receive a very lucrative income from said property—I don't recall the name of the man at this instance, but he did have a plantation—coffee plantation in the Sierra Maestra, and his yearly income from that plantation was $85,000 a year. So, I'm sure the court can understand that my desire to get a part of this land which is virgin land, which would have required a great deal of work to clear, but complete it would have been a very lucrative and very beneficial for a future. And to maintain it it would not require permanent residence in Cuba, as I am sure that you know many Americans own property in Cuba and spend practically no time in Cuba whatsoever—and still receive a very lucrative income.

Q. You mean used to? A. Used to.

Q. Now—I'm sorry—have you finished your answer? A. No. And I considered that being as it was under the Revolutionary Law, at the time that there would be a complete democratic country and once free elections has been established, it would return to a very prosperous and fertile business.

• • •

Q. Now, Mr. Marks, at the time of your return to Cuba in the early part of January 1959, did

you return for the purpose of engaging in any military activity? A. No, I didn't.

Q. To your knowledge, was there any military activity going on? A. No.

* * *

Counsel to Respondent:

Q. Did you intend to go back to perform any combat duty? A. No.

Q. Did you go back with the intention of being a soldier? A. No.

Q. Did you go back with the intention of serving in the Cuban Army? A. No.

Q. Did you go back with the intention of serving in the Revolutionary Army? A. No.

Q. Did you understand that the Revolutionary Army would continue with any kind of military activities upon your return? A. No, I didn't. I was under the interpretation that the revolutionary forces would be nonparticipant unit, only as a police unit, until a free election." (App. 187a-190a)

In *Nishikawa* the finding of the trial court, which was not disturbed by this Court, was that Nishikawa, a national of Japan, had returned to Japan with the intention and expectation of being drafted. Nishikawa was a Japanese national, returning to Japan in 1939, knowing that he was subject to conscription in the Japanese Army, and knowing that Japan was conscripting its nationals. According to the trial judge, Nishikawa "went over because as a Japanese citizen under the laws of Japan it was necessary for him to serve his hitch in the army * * *. He went over and he waited until they reached him on the draft, and when they did he was drafted" (356 U. S., at pp. 132-133). It was nevertheless held that Nishikawa's subsequent service was not voluntary and therefore not expatriating.

Similarly, in *Podea* v. *Acheson*, 179 F. 2d 306 (C. A. 2), a native-born American who had been brought as a child to Roumania by his Roumanian parents, returned to the United States as a reporter, and then went back to Roumania where he was inducted into the Roumanian Army. Although Podea could have remained in the United States either as a citizen or as a permanent immigrant, his return to Roumania and induction there were held no basis for his expatriation. And in *Pandolfo* v. *Acheson*, 202 F. 2d 38 (C. A. 2), a native-born American brought to Italy as an infant by his Italian parents, who served two tours of duty in the Italian Army and took an oath of allegiance to the King of Italy, was held not to have been expatriated although he had an American passport and could have left Italy for the United States.

As compared with the facts in the governing cases, and particularly *Nishikawa*, the petitioner's return to Cuba when hostilities were at an end, without any intention of engaging in any military service, and without any knowledge or belief that he, as an American citizen, could or would be impressed into the military service in Cuba, forecloses the use of such return as a basis for expatriation. It may fairly be concluded that the authority of *Nishikawa* precludes any reliance upon Marks' return to Cuba in early January, 1959, as evidence of his voluntary service in the Rebel Army.

2. Impressment of Marks into service in the Rebel Army in January, 1959.

Upon Marks' return to Cuba he sought out Che Guevara, his former chief (App. 151a). With Che Guevara he went to La Cabana—that was the place where "all the men I served with in the Sierra Maestra were stationed" (App. 151a). Marks stayed overnight at a room in Guevara's home, had breakfast with Guevara, and promptly thereafter was told to perform certain duties at La Ca-

bana (App. 151a-152a); "he just told me—you're going to take over such and such a job—and that's it" (App. 152a). When asked why he complied with the order of Che Guevara—who stands second in power in Cuba only to Castro—the petitioner testified: "No one refuses an order from Che Guevara, believe me" (App. 152a); "you would find a million dollars faster by putting your head through that pillar than refusing Che Guevara" (App. 153a); "that is plain suicide by refusing an order from Che Guevara" (App. 153a). Marks plainly was not at liberty to refuse the order of Che Guevara, particularly since Marks still considered himself, at the time, a member of the Rebel Army (App. 152a-153a).

Guevara's conscription of the petitioner by fiat was, for present purposes, the equivalent of the Japanese conscription of Nishikawa by law. This Court has just recognized and held that the directive of a high official has the same coercive effect as a duly promulgated law and compliance with the former is no less the result of coercion than compliance with the latter. *Lombard* v. *Louisiana*, 31 U. S. L. W. 4476. Enforced compliance can be achieved "by an official command which has at least as much coercive effect as" a formal law (*Id.*, at p. 4478). Here the ultimate issue on the question of voluntariness is the petitioner's state of mind, and not the technicality of legal amenability to conscription laws.

Nishikawa, receiving a draft notice in the mail, was under no greater state of compulsion than was Marks when he received a direct and personal order to duty from one of the highest and most powerful figures in the Cuban revolutionary force. Viewed realistically, Nishikawa had more time for deliberation and more opportunity for exploring alternatives than Marks had when confronted with a directive from Che Guevara. If it was involuntary service for Nishikawa to obey a notice received through the mail, it was

likewise involuntary for Marks to have accepted the command uttered in his presence by a revolutionary leader with unlimited powers and addressed to an individual who still considered himself subject to the orders of his superior. It will, of course, be remembered that Nishikawa was a dual-national, not confronted with the prospect of statelessness—a circumstance pointing to the need here of a construction of the law and facts even more favorably to Marks than to Nishikawa.

3. Marks' service in the Rebel Army from 1959 to May, 1960.

That Marks, a captain in the Rebel Army, had no option but to serve in the Rebel Army after his return to Cuba in 1959 is clear from the proof.

Marks testified, without contradiction, that he requested permission to leave the Rebel Army after January, 1959, but was denied such permission (App. 191a-192a). Any efforts at self-help in this regard would have constituted counter-revolutionary activity or desertion punishable by death, and Marks was fully aware of this situation (App. 131a-132a, 192a). Marks testified that he was not at liberty to leave the Rebel Army without the prospect of imprisonment or execution; he stated his understanding that if he left the Rebel Army without permission the consequences would be "for my desertion—the penalty for desertion was imprisonment or death by the firing squad" (App. 132a). Those men who had attempted to leave, according to Marks, "are now serving prison terms of up to ten years" (App. 160a).

In this respect it is noteworthy that our State Department commented that:

> "* * * Maj. Huber Matos Benitez, revolutionary commandante of Camaguey Province, was a hero of the Sierra Maestra. When Major Matos challenged

> the spread of Communist influence and requested permission to resign from the army, he was put on trial for conspiracy, sedition, and treason and sentenced to twenty years' imprisonment. * * * " (App. 288a).

Every witness who was questioned on the matter, the Service's witnesses as well as petitioner, testified that leaving the Rebel Army without permission amounted to the grave and punishable crimes of desertion and counter-revolution (App. 132a, 160a-161a, 190a-192a, 208a, 213a-214a, 218a, 230a), irrespective of whether the deserter was American or Cuban (App. 211a-213a). Various notices concerning desertion appear in the Official Gazette for July 13, 1959 which is Exhibit 14 at the Service hearing. And in the case of petitioner, the threats to his life when he finally sought to escape from Cuba (App. 133a-134a) confirm that service in the Rebel Army was obligatory, not voluntary.

The fact that Marks made no effort prior to May, 1960, to escape from the Rebel Army or Cuba is, of course, not significant. No such proof was proffered or required in *Nishikawa* or in any other case on the subject. It is enough that Marks' continued service was mandatory under the laws and practices governing desertion. For in such circumstances his service was, under the cited authorities, involuntary and, therefore, no grounds for expatriation.

Nor is it required by the cases that, as was suggested below (203 F. Supp., at p. 394), expatriation follows for failure to lodge complaint with the American consul against conscription or continued service. In *Nishikawa* it was specifically observed that the "petitioner did not protest his induction or attempt to renounce his Japanese nationality, to return to the United States or to secure the aid of United States consular officials." (356 U. S., at pp. 131-132.) The pertinency of the *Nishikawa* ruling here is clear from the uncontradicted testimony of Marks that many

Americans in Cuba who had requested aid of the consular offices had received no help (App. 164a-165a).

It is, in any event, unnecessary to demonstrate that Marks' activity with the Cuban Rebel Army from early January 1959 to May 1960 was solely and exclusively caused by physical coercion or fear of the consequences for desertion. It is enough, as we have indicated, that a *bona fide* fear of disastrous consequences was a contributing factor to Marks' stay in the Rebel Army. Such a circumstance, if present and contributory, is sufficient to render Marks' service in the Rebel Army involuntary under the applicable authorities. Under this standard the proof fully and amply sustains a finding of involuntariness; at the least, the record raises sufficient doubts on this score so that it was inconsistent with *Nishikawa* to find that the heavy burden of proof here imposed upon the respondent had been met.

B.

Marks never served in "the armed forces of a foreign state" as those terms are used in § 349(a)(3)

§ 349(a)(3) prescribes loss of citizenship for service in the "armed forces of a foreign state" irrespective of whether the individual concerned is a national of that foreign state; § 349(a)(4), on the other hand, denationalizes for employment by a foreign state of which one is a national. Since the statute thus distinguishes between service in an armed force and other forms of employment, it is here important to define exactly the term "armed forces" as used in § 349(a)(3). For unless Marks served in an "armed force" as distinct from other foreign employment, denationalization would not be permissible.

Not all employment involving the use of arms constitutes service in an armed force: Police, prison guards, correction officers, peace officers, etc., all carry and may use arms, yet are plainly not members of an "armed force".

An armed force is characteristically an armed body of men organized for the purpose of waging or preparing to wage war. Thus, the word "army" derives in part from the term "armata" meaning "armed force". 1 Century Dict. 1914 ed.) 315. The equation of the terms "armed forces" and "military" is demonstrated in 2 Encyc. Brit. (14th ed.) 396 which defines "army" as a "considerable body of men armed and organized for the purpose of warfare on land * * *, or the whole armed force at the disposal of a state or person for the same purpose * * * *". The federal statute defining "armed force" has exclusive reference to the Army, Navy, Air Force, Marines, or Coast Guard [10 U.S.C.A. § 101 (4)].

Accordingly, in *United States* v. *Kenny*, 247 F. 2d 139, 143 (C. A. 2), the identification of the term "armed forces" solely with the Army, Navy, Air Force, Marines, or Coast Guard was held so clear that

> "The contention that service with the National Guard constitutes service in the Armed Forces of the United States for purposes of Section 315 of the Immigration and Nationality Act is preposterous."

Similarly, it has been held that neither the Canadian Officer Training Corps [*in the Matter of O*, file =56108/718 (BIA, 1942); *In the Matter of Z*, 2 I & N Dec: 346 (1945)] nor the Queens University Air Reserve [*In the Matter of L. F.*, 2 I & N Dec. 455 (1946)] is an "armed force" for purposes of denationalization. In *Matter of Z, supra*, at p. 350, it was pointed out that the statute contemplates "only service in that part of a foreign army which is activated or subject to active military duty * * *."

The official documents here in evidence, as well as the oral testimony, establish that in the period of time here in issue following January 2, 1959, and after the termination of hostilities between Castro and Batista, the Rebel Army was not an "armed force" as hereinbefore defined and understood.

A fair reading of the record will show that when, on January 1, 1959, the Rebel Army under Castro had concluded the rout of the Armed Forces of Cuba under Batista, the military function of the Rebel Army was at an end. There is no proof that the Rebel Army thereafter engaged in any combat or other distinctively military activity. Instead the untrained, revolutionary, peasant force which, as the Rebel Army, had made the revolution (App. 93a, 121a, 122a), became the militant, but not military, core of the effort to consolidate, implement, and safeguard the revolution. In this endeavor the personnel and ranks of the pre-January 1, 1959 format were retained, but the function shifted from the conduct of a revolutionary military war to revolutionary social and economic reconstruction.

One recent authoritative analysis of the non-military nature of the post-January 1959 Rebel Army observed:

> "*Armas? Para qué?* Castro's question of January, 1959, has long since been laid to rest in the vast cemetery of betrayed ideas beside the slogan that was soon to follow: 'The revolution makes barracks into schools.'" (Leo Sauvage, Castro's Foreign Legion, 27 The Reporter, No. 5, Sept. 27, 1962, p. 21.)

> "From the very start * * * Fidel Castro took great care to place strict limits on the role and the powers of his troops in olive green [the Rebel Army]. Perhaps he simply wanted to prevent the national army from becoming so powerful that it might some day follow the unhappy precedents set by so many Latin-American armies, including Batista's Cuban 'army of sergeants.' More probably Castro mistrusted the Ejército Rebelde [Rebel Army] for much more immediate reasons * * *

> "Distrusting his national army, Castro founded a militia, in whose training political indoctrination took on at least as much importance as the manual

> of arms * * *. [I]n general the companies of *barbudos* who had brought Castro to power ended by being downgraded into working parties, trusted only to carry shovels rather than guns." (*Id.*, at p. 22.)

The record here fully supports the foregoing evaluation of the post-revolutionary status and function of the Rebel Army.

Thus while § 349(a)(3) is premised upon service in "the armed forces" of a foreign state, the Rebel Army was never known as the Cuban Army or the "Armed Forces" of Cuba. These designations were, in the post-revolutionary Cuban lexicon, reserved for the army of Batista for the period prior to the dissolution of the Cuban Army in October, 1959 (App. 90a, 256a-257a, 277a-279a); after October, 1959 it was intended to establish the "Revolutionary Armed Forces", an organization to be distinct from the Rebel Army (App. 268a-275a); during neither period was the Rebel Army designated the Cuban Army or the "Armed Forces" of Cuba.

The record here further establishes that the Rebel Army never had a confluence of *de facto* and *de jure* status as a military agency. During the revolutionary period the Rebel Army could not, of course, attain a *de jure* status. On January 13, 1959, after the overthrow of Batista, the organic law establishing the "Armed Forces"—Batista's army—was suspended by Law No. 13 (App. 256a-257a), but according to the Service's expert witness, Law No. 13 did not dissolve the former Cuban Army (App. 91a, 97a); that Army remained in being as the "Cuban Army" until its dissolution by Law No. 600 of October, 1959 (App. 99a, 270a). The Service's expert witness explicitly testified that prior to Law No. 600 of October, 1959 the Rebel Army "did not have that legal status" (App. 104a); another Service witness observed that the regular army continued to function up to October, 1959 while the Rebel Army "had an

awkward position, because we had authority, we made arrest, we represent the government as authorities and, yet, officially, we weren't regular army" (App. 223a). And the same Law No. 600 which, in October, 1959, recognized the existence of the Rebel Army, purported to dissolve all pre-existing military agencies and to reorganize them as part of the new Ministry of the Revolutionary Armed Forces (App. 268a-269a).

It is most significant that not until October, 1959 did the Rebel Army acquire even the semblance of legal status. For it was precisely then, according to another Service witness, that the state militia was formed (App. 226a). The report of the United States State Department of April 4, 1961 specifies the role which the militia played in post-revolutionary Cuba:

> "The history of the Castro revolution has been the history of the calculated destruction of the free-spirited rebel army and its supersession as the main military instrumentality of the regime by the new state militia" (App. 287a).

The accuracy of this description of the militia "as the main military instrumentality of the regime" was confirmed by one of the Service's witnesses, who testified that the militia was formed to engage in "war training" (App. 227a), in which capacity the militia served "all through Cuba" (App. 230a). This same witness, who had served in the Rebel Army, testified:

> "Q. And what was the distinction between the state militia and the Rebel Army? A. Well, our function was rather like a police, like a military police, or something like that.
>
> Q. That was the function of the Rebel Army? A. More or less" (App. 227a).

Juxtaposed to the described failure to accord the Rebel Army legal status until the establishment of a state militia

which would perform the military function in post-revolutionary Cuba, is the careful and inspired confinement of the Rebel Army to patriotic but non-military duties.

In Law No. 100 of February 23, 1959, the post-revolutionary nature and function of the Rebel Army were delineated in the legislation's preamble as follows:

> "WHEREAS: It is necessary to prove with repeated actions the firmness of our revolutionary struggle; the firmness of our love for the national territory; the firmness of the promises signed with blood in the battlefields; the full solidarity of the Rebel Army with the peasants and the people, in order to reaffirm and prove at the time of the Revolutionary Government that it is and it will continue to be a vehicle for the defense and betterment of the citizenry.
>
> WHEREAS: Having won the war of bullets, it is now necessary to win the war of peace, and the Rebel Army being formed mostly by the same peasants who waged the guerrilla war against the dictatorship they overthrew, nothing is fairer than to employ in a revolutionary work, those who were directly affected by the evils they fought against and fighting which a lot of their fellowmen died.
>
> WHEREAS: A sure means of keeping the morale in the Revolutionary ranks, is to engage the Rebel Army in creative tasks for the benefit of the citizenry reaffirming in this manner their civic and not their military calling". (App. 261a)
>
> "WHEREAS: The Rebel Army cannot, has been unable to and shall not be able to live with the back turned on the peasants' problems of all kinds and on those of the poor and working classes of our country and has fought and will continue to fight for a change in the social regime of traditional misery and lack of culture of the Cuban people, and it brings as a battle banner the Agrarian Reform, as a means for obtaining improvement in the life level of the peasant and of the working people, ending in this manner

and on this basis the dreadful problem of unemployment." (App. 262a).

"And, inasmuch as throughout the articles of Law No. 3 on Agrarian Reform, issued by the Office of the Commander General of the Rebel Army in the Sierra Maestra, is stipulated the development of forests wealth, dam construction and impounding of river waters for irrigation and utilization of power for the production of hydroelectric energy, construction of schools, medical dispensaries, official agencies for the technical and financial aid to peasants, sports field and farmhouses or agricultural experimenting centers, buildings or houses for living quarters, and in everything it refers to assistance of all kinds to be given to the peasants and their families and to the victims of the war against the dictatorship and their relatives." (App. 262a-263a)

Law No. 100 then proceeds to provide in its Article 1 that:

"The following departments of the Rebel Army are hereby created, to be assigned to the Ministry of Defense:

(1) Department of Technical, Material and Cultural Assistance to the peasant.

(2) Department of Construction of Peasants' Homes.

(3) Department of Reforestration.

(4) Department of Construction and Organization of Groups of Schools.

(5) Department of Commercial and Industrial Associations and Cooperatives for Consumption and Production of Agricultural Products.

(6) Department of Beaches for the People.

(7) Department of Assistance to War Victims and their Relatives." (App. 259a)

It was, therefore, early established that following the revolution the Rebel Army was to be converted from an instrument of revolutionary warfare to one of revolutionary reforms and reconstruction. It bears repetition that the declared intention of the law was "to engage the Rebel Army in creative tasks for the benefit of the citizenry, reaffirming in this manner their civic and not their military calling".

Law No. 600 of October 16, 1959, by which the "Armed Forces" were dissolved and the new "Revolutionary Armed Forces" were formed, contains the most striking proof of the non-military nature of the Rebel Army in post-revolutionary Cuba. After Law No. 600 extols the virtues of the Rebel Army in the most extravagant terms in its preamble (App. 269a), Article 9 of Law No. 600 provides that persons drafted into active service in the Armed Forces would, for purposes of seniority and retirement, receive credit for time "fighting against the dictatorship", time "served in the dissolved Army", time served as a political prisoner prior to December 31, 1958, etc.—but no credit for time served in the Rebel Army after January 1, 1959 (App. 271a-272a). In this manner it was officially made clear that after January 1, 1959 the Rebel Army was not engaged in a military capacity.

The proof of record concerning the actual work done by the Rebel Army in and after 1959 leaves little doubt of the "civic and not (the) * * * military calling" of the Rebel Army starting in January, 1959. In its principal aspects, the work of the Rebel Army after January, 1959, resembled the "incidents of a war economy", organized and directed by government, which were held not to be foreign government or military service for purposes of denationalization in *Kawakita* v. *United States*, 343 U. S. 717.

Not one witness or exhibit suggests that any combat duty was performed by the Rebel Army during the period

in issue. Marks testified that, starting in January, 1959, the Rebel Army was engaged in no maneuvers, no drills, and no training in combat duties (App. 121a-122a, 123a, 125a, 192a-193a). In this testimony he was corroborated by two witnesses offered by the Service (App. 200a-201a, 228a-229a). Marks also testified that men under his command constructed schools and cleared beaches (App. 176a-178a). The Service's witness, Gonzalez, testified on this score as follows:

> "Q. Would you describe the kind of work that the Rebel Army did after January, 1959? A. Well, one part is in the quarters, barracks, other parts are in labor battalions, building houses and building roads. Another part is in the agriculture—agrarian reform, land reform, reparation and river works." (App. 201a)

Another Service witness, de la Torre, testified on redirect examination that the Rebel Army was "engaged in work on reforestration", "construction work as relates to schools", planting trees, and building roads (App. 232a-233a). The attempt of the District Court to discount the significance of these post-January, 1959 functions of the Rebel Army by reference to the civilian and construction activities of the United States Army (203 F. Supp., at p. 394) fails, of course, to meet the issue raised by the proof here: the United States Engineering Corps performs its construction functions as an incident to its military activities and objectives; starting in January, 1959, pursuant to Castro's carefully conceived pattern of diverting the "free-spirited" and distrusted Rebel Army from military functions and power to enterprises less threatening to Castro's hegemony, the Rebel Army was engaged almost exclusively in reconstruction and police activities, and performed no typically military duties to which its "civic" functions were incidental or subordinate.

In the last analysis the armed forces of a state comprise that establishment which has the function of waging war. An armed force is, therefore, recognizable as a body of men engaged in either waging war or preparing to wage war. Uniforms, arms, commands, etc., are characteristic of various non-military as well as military agencies. Only waging war or preparing to wage war distinguishes an armed force. By these decisive criteria the respondent's proof here necessarily fails.

The Rebel Army waged no war from January 1959 to May 1960. And the totality of the respondent's proof of preparation for war by the Rebel Army during that period comes to the following:

> "*SIO to Witness Gonzalez*:
>
> Q. You haven't answered my question. I am interested in knowing whether you observed any members of the Rebel Army who did receive military instruction or did engage in military maneuvers after January 1st, 1959. A. I have seen soldiers in marching, training and also in parading.
>
> Q. When? A. That was in the first month of the revolution, to teach those Rebel soldiers who didn't know how to parade in military formation." (App. 245b)

> "Q. You continued. In what manner? A. [Ball-Llovera] When Fidel Castro took over, I had to wait in Operations for two or three months, and report every so often, then, after that, I was called as a teacher to the—in the—infantry, to the base of San Antonio de los Banos, known as the base of Cayuga. I was appointed by Captain Achiles Chinea.
>
> Q. What kind of appointment did you receive? A. Simply to teach the soldiers how to drill in close drill." (App. 249b)

The record reveals no further proof of activities by the Rebel Army after January, 1959 constituting preparation for war.

Marks' testimony that the Rebel Army engaged in no military maneuvers, drills, or training (App. 121a-122a, 123a, 125a, 192a-193a) was forefully corroborated by Service witnesses:

> "Q. Now, Mr. Gonzalez, during the period that you served in the Rebel Army, following January 1, 1959, did you ever engage in any combat duty? A. I can't talk about combat duty because there was no war.
>
> Q. Now, during the period after January 1, 1959, did he—and prior to the time that he left Cuba, did he ever engage—
>
> SIO: Excuse me, counsel—'you'—please.
> Counsel: Yes.
>
> *Counsel to Witness Gonzalez:*
>
> Q. Did you ever engage in any kind of maneuvers, military maneuvers? A. No, and I didn't even receive military instruction, training.
>
> Q. During the period after January 1959, did he ever engage in any kind of drills and—of a military nature? A. No, not me." (App. 200a)
>
> "Q. Did you personally ever engage in any combat duty after January 1, 1959? A. [de la Torre] After?
>
> Q. Yes. A. No, sir.
>
> Q. Did you ever engage in any military maneuvers? A. No, sir.
>
> Q. Did you ever engage in any military drills? A. No.
>
> Q. Did you get any military instruction? A. No." (App. 228a-229a)

We know of no instance of an armed force which does not train its men in the art of war. An armed force exists to wage war, and cannot serve its disinctive function if it does not prepare personnel and equipment for fighting. Here the issue posed was whether the Rebel Army was an armed force. The Service produced numerous witnesses

associated with the Rebel Army in an attempt to demonstrate an affirmative answer to the issue. Yet the record is wholly lacking in proof of the single, universal aspect of armies—training for war. This void is, of course, not the product of any oversight; it is, rather, a striking affirmation of the declaration of February 23, 1959 in Public Law No. 100 that after January 1959 the Rebel Army was assigned a "civic and not * * * [a] military calling" (App. 261a).

The conclusion of the District Court that the Rebel Army was the "Armed Force" of Cuba (notwithstanding the conclusive documentary evidence that the term "Armed Forces" was never identified with the Rebel Army) is based largely upon the indicia of military rank, insignia, identification cards, uniform, chain of command, pay, and arms. Even in these matters the record is unclear as to the existence of military forms—the issued uniforms were established as fatigues, better suited to laborers than soldiers, and on many occasions civilian clothes and not any uniforms were worn (App. 206a, 211a, 219a-220a); no single type of hat was issued or worn (App. 209a-210a); payment of salary was uncertain (App. 173a, 194a); duties were vague (see Ex. 1, Tr. 503-504); and the chain of command was unsettled (App. 122a, 125a). But the more serious error below on this matter was the uncritical deference to the alleged forms of the military perceived in the Rebel Army while disregarding the far more significant consideration that, starting in January, 1959, the work and functions of the Rebel Army were explicitly "civic and not * * * military." Just as neither rank, nor chain of command, nor uniform, singly or in combination, make the Boy Scouts, or the Salvation Army, or Police or Fire Departments the equivalents of an "Armed Force," so do those same characteristics fail to transmute the post January 1959 Rebel Army into a military establishment.

Nor can the post-revolutionary Rebel Army be considered as the body of men who would take to arms if war came. The state militia and not the peasant-formed Rebel Army was the post-revolutionary military force of Cuba. In any event, even if the Rebel Army was a reserve military body, the ruling in *United States* v. *Kenny*, 247 F. 2d 139, 143 (C. A. 2), establishes that a reserve force, such as the National Guard, is not an armed force.

All that has been said here concerning the Rebel Army generally has particular application to Marks' post-revolutionary Rebel Army duty and experiences. Without exception, starting in January, 1959, Marks' work consisted of police and security functions (App. 120a-126a, 154a-155a, 157a, 162a)—functions to which a pistol, a uniform, and a rank were all appropriate. There is no competent testimony that Marks engaged in any activity typical of military establishment—there was no military action, training or instruction; no maneuvers or drills, no salutes; and only the most meagre semblance of a uniform.[7] Whether serving as a prison officer, or a rural guard, or a security officer, Marks was at no time engaged in a function directly or indirectly related to the waging or preparation for the waging of war.

The record here demonstrates a total absence, on and after January 2, 1959, of service by Marks in a military

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[7] The Service and apparently the Courts below relied heavily upon an article in the December, 1960 issue of "Cavalier" magazine, to establish that Marks had made admissions therein of service in an armed force. Much of the language of the Court of Appeals purporting to describe petitioner's activities comes from that article. It should be noted that the article was not offered and was not admitted for such purpose, the Service having refused to offer the article for the truth of its contents (App. 180a-185a). Marks pointed out that the article was not in the form he had originally approved (App. 183a). In any event, while the article refers to certain military forms, it does not establish the military activity necessary to the respondent's case.

organization or the performance of military service. But if the record is not as clear on this score as we maintain, then it must be remembered that the burden of proving that Marks' post-January 1959 activity was military in nature rests with the respondent, and that that burden must be met by clear, convincing, unequivocal, and even overwhelming proof. See, *e.g.*, *Lehmann* v. *Acheson*, 206 F. 2d 592 (C. A. 3). Such a burden has patently not been sustained. If no more than the official documents, Laws No. 100 and No. 600, be read, serious doubts must be acknowledged as to whether the Rebel Army was engaged in military and not civic functions. And since " 'Rights of citizenship are not to be destroyed by an ambiguity' " (*Kawakita* v. *United States*, 343 U. S. 717, 728), all doubts on this issue must be resolved in favor of Marks [*Kenji Kamade* v. *Dulles*, 145 F. Supp. 457, 458-459 (D. Cal.) (Weinfeld, J.)]. The failure of the Courts below to do so is in conflict with the decisions of this Court.

V

The finding of the Court below that the petitioner, if an alien, is deportable raises substantial and unsettled issues of constitutional and federal law.

It will be recalled that the petitioner was arrested and detained as an alien allegedly deportable on the grounds that he was excludable because of his conviction in 1952 of a crime involving moral turpitude and, further, because at the time of his entry into the United States in July, 1960 he did not possess the entry documents required of an alien. The District Court rejected both grounds; the Court of Appeals sustained the second and did not consider the first.

A.

The ruling below assumes, of course, the power of government to deport a native-born American rendered state-

less in the absence of an express renunciation of American citizenship or allegiance. Such a power to banish has never heretofore been sustained in American jurisprudence. To the contrary, in that portion of the dissenting opinion of Chief Justice Warren in *Perez* v. *Brownell*, 356 U. S. 44, which was not controverted in the majority opinion, the Chief Justice pointed out:

> "Even if Congress can divest United States citizenship, it does not necessarily follow that an American-born expatriate can be deported * * *. Since the deporting power has been held to be derived from the power to exclude, *Fong Yue Ting* v. *United States*, *supra*, it may well be that this power does not extend to persons born in this country. As to them, deportation would perhaps find its justification only as a punishment, indistinguishable from banishment. See dissenting opinions in *United States* v. *Ju Toy*, 198 U. S. 253, 264; *Fong Yue Ting* v. *United States*, *supra*, at 744." (356 U. S., at p. 65, n. 6)

It is, accordingly, the petitioner's basic premise that there is no power to deport Marks even if he be deemed to have been denationalized.

B.

The law governing the requirement of entry documents of a citizen subsequently denationalized is set forth fully in *Matter of W*, 5 I & N Dec. 759. That case establishes that the relation-back doctrine in the instance of denationalization is inapplicable to documentary matters. The rationale is clear: one who is a citizen at the time of entry, though subsequently denationalized for reasons dating back prior to the entry, obviously cannot be required to obtain and possess at the time of entry the entry documents required of aliens. Until denationalized, the citizen could not have known he was an alien and could not have been expected to apply for papers issued to aliens.

Thus, in *Podea* v. *United States*, 179 F. 2d 306 (C. A. 2), where the native-born American of Roumanian parents

had served in the Roumanian Army, it was held that his failure to come to the United States as an immigrant prior to induction in the Roumanian Army was no grounds for expatriation, Judge A. N. Hand saying that if the petitioner had so assumed immigrant status

> "* * * he might have had to meet the claim that he had conceded Roumanian citizenship and be confronted by a concession of serious if not fatal character." (179 F. 2d, at p. 309.)

The foregoing principle has direct application here. At least until the proceeding in the Immigration Service was at an end, there can have been, and there was, no competent determination that Marks was expatriated. The State Department notification to Marks of denationalization, which was not preceded by notice or hearing, was, of course, no such determination. In fact, the Hearing Officer at the immigration hearing, declared that the State Department action is "not binding in this proceeding" and "not an adjudication of the man's alienage or citizenship" (App. 42a-44a), and the Examining Officer consented to offering the State Department notice for the limited purpose of proving "that the respondent has been served with such a certificate, without offering it for any binding effect as to the finding there contained" (App. 53a). Consequently, at the time of his entry into this country on July 22, 1960, Marks could not have sought or obtained entry documents as an alien without acknowledging an expatriation which had not then been competently determined or established. *Matter of W*, *supra*, settles that in such circumstances there is no excludability for lack of entry documents.

The Court of Appeals held, however, that the effect of § 349(a)(3) is to denationalize immediately upon the occurrence of the prescribed event thereby rendering the petitioner an alien for all purposes from the date of such event —a conclusion which would render him an alien (at least as

of July, 1960) so as to require entry documents.[8] The short answer to this contention is that the statute does not specify that denationalization shall take effect immediately upon the prescribed event. It is, moreover, settled that, as a native-born American, the petitioner's loss of citizenship can only be established by a judicial determination of his alienage; admittedly such a determination is a jurisdictional prerequiste to any action based upon such alienage. (*Ng Fung Ho* v. *White*, 259 U. S. 276; see also authorities and discussion at pp. 38-39, *supra*). Accordingly, until a judicial declaration of his alienage, Marks' American citizenship was unimpaired for purposes of any administrative action, including the requirement of entry documents which only aliens need procure. The principle of *Ng Fung Ho* obliterates—and for constitutional reasons—the argument that at the time of his entry into the United States in July, 1960 Marks was required to concede and act as if he were an alien rather than a citizen.

The impact of the foregoing authorities is not avoided by the language of § 356 of the Immigration & Nationality Act of 1952 (8 U. S. C. A. 1488) cited by the Court of Appeals. § 356 provides that loss of nationality "shall result solely from the performance" of any of the prescribed denationalizing acts. This is read by the Court of Appeals to mean that denationalization "shall result immediately upon the performance" of any of the foregoing acts. § 356 does not lend itself to such construction. Its meaning is, rather, as indicated in *Kawakita* v. *United States*, *supra*, at pages 730-731, "that the only methods of expatriation are those contained" in the denationalization statutes.

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[8] It is not clear which entry documents would have been required of Marks or which he could have obtained. In any event, since the respondent contends that Marks was excludable by reason of his prior conviction, it is clear that if Marks had attempted to obtain entry documents as an alien in July, 1960 he would have been excluded and thereby forced to litigate his claim of citizenship from abroad.

C.

Excludability of an alien for a prior conviction involving moral turpitude is authorized by § 212(a)(9). That section, however, applies to "*aliens* who have been convicted" of such a crime. Marks' conviction occurred in 1952 when he was a citizen, and prior to the occurrence of any of the allegedly expatriating events. § 212(a)(9) is, therefore, here inapplicable.

A fair reading of § 212 in its entirety evidences the congressional intention that those provisions of excludability which refer to aliens shall apply only to the acts and qualities of aliens *qua* aliens. § 212(a)(22) confirms this analysis. It is there provided that excludability shall extend to

> "Aliens who are ineligible to citizenship, except aliens seeking to enter as nonimmigrants; or persons who have departed from or who have remained outside the United States to avoid or evade training or service in the armed forces in time of war or a period declared by the President to be a national emergency, except aliens who were at the time of such departure nonimmigrant aliens and who seek to reenter the United States as nonimmigrant aliens and who seek to reenter the United States as nonimmigrants."

The marked difference in the manner in which § 212(a)(22) refers to "persons" denationalized for draft evasion as compared with "aliens" confirms that § 212(a)(9) concerns conviction of an alien while an alien. The Service is, therefore, unwarranted in charging petitioner to be excludable for a conviction at the time he was concededly a citizen.

Doubts on the argument under this point are resolved in Marks' favor by *Mangaoang* v. *Boyd*, 205 F. 2d 553 (C. A. 9), *cert. den.*, 346 U. S. 876. It was there proposed to deport for membership in the Communist Party pur-

suant to 8 U. S. C. A. 1182(28)(c) ("Aliens who are members of or affiliated with * * * the Communist Party of the United States"). The proof showed that the alleged Communist Party membership occurred while Mangaoang was a citizen of the United States, and that such membership terminated before he lost his United States citizenship as a result of the proclamation of Philippine Independence in 1946. In these circumstances, it was held that the alien was not deportable for his alleged Communist Party membership, the Ninth Circuit saying:

> "* * * We think it was not sufficient to prove that the appellant was an alien at the time of his arrest and that he was a member of the Communist Party at some prior date on which he was not shown to have been an alien." (205 F. 2d, at p. 555)

United States ex rel. Eichenlaub v. *Shaughnessy*, 338 U. S. 521, is not to the contrary. In *Eichenlaub* naturalized citizens, whose citizenship was later revoked and cancelled *ab initio* for fraud in the procurement, were held to be deportable for convictions sustained during the period of the fraudulent naturalization.[9] In writing the opinion for the Court, Mr. Justice Burton expressly stated that the case did not involve the questions which would arise in the instances of the loss of citizenship "by lawful and voluntary expatriation" (338 U. S., at p. 528 n. 14). This reservation is here highly significant in view of the contention made by Mr. Justice Frankfurter in his dissent that the decision would have serious implications with respect to citizens who might be denaturalized for reasons such as voting in a foreign election or serving in the armed forces of a foreign state (see 338 U. S., at p. 535). It is, therefore, unquestionable that the Court in *Eichenlaub* expressly withheld passing upon the issue

[9] This decision was not that of a majority of the Court since two Justices did not participate in the decision and three dissented.

as raised in the instant case. The authorities and the reasons cited herein remain intact and unimpaired by *Eichenlaub*, and dictate that Marks' conviction while a citizen constitutes no basis for deportation.

CONCLUSION

The petition for a writ of certiorari to the Court of Appeals should be granted.

Respectfully submitted.

MURRAY A. GORDON,
Attorney for the Petitioner.

APPENDIX

Opinion of United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 170—October Term, 1962

(Argued December 11, 1962 Decided April 9, 1963)

Docket No. 27557

—o—

UNITED STATES OF AMERICA, *ex rel.*
HERMAN FREDERICK MARKS,
Relator-Appellant-Appellee,

v.

P. A. ESPERDY, as District Director of the Immigration and Naturalization Service, New York District, United States Department of Justice,
Respondent-Appellee-Appellant.

—o—

Before:

WATERMAN, SMITH and HAYS, *Circuit Judges.*

On appeal in habeas corpus proceeding, native-born American relator appeals from judgment, United States District Court for the Southern District of New York, Cashin, J., that he is now an alien, and respondent District Director of the Immigration and Naturalization Service appeals from judgment that relator is not a deportable alien and from the granting of the writ.

Judgment of alienage affirmed, judgment that relator is not deportable reversed, and cause remanded with instructions that the writ be dismissed.

MURRAY A. GORDON, New York City, *for Relator-Appellant-Appellee.*

VINCENT L. BRODERICK, U. S. Atty., S. D. N. Y. (Roy Babitt, Spec. Asst. U. S. Atty., of counsel), *for Respondent-Appellee-Appellant.*

WATERMAN, *Circuit Judge*:

Herman Frederick Marks was born in Milwaukee, Wisconsin, on August 1, 1921. In 1958 he went to Cuba and there joined Fidel Castro's revolutionary forces fighting in the Sierra Maestra Mountains to overthrow the government of Fulgencio Batista. After the revolution was brought to a successful conclusion in January 1959, Marks continued to serve as a captain in the Cuban Rebel Army. He was placed in command of some 7,000 to 8,000 men charged with the security of La Cabana, a military prison and fortress in Havana. There he presided over the execution of numerous prisoners condemned to death by military tribunals. Later he was assigned to give instructions on the use of weapons at a military police school and at Principe Prison, where he again commanded a unit of security guards.

In May 1960, Marks, having lost favor with the Castro regime, left Cuba and in July of that year re-entered the United States.

In January 1961, Marks was arrested by officers of the Immigration and Naturalization Service. The Attorney General commenced deportation proceedings against him

charging that, pursuant to 8 U. S. C. § 1481(a)(3),[1] he had lost his American citizenship by serving in the armed forces of a foreign country without authorization of the Secretary of State and the Secretary of Defense; and, that being an alien, he was a deportable one, 8 U. S. C. § 1251(a)(1), as he had been convicted in 1951 of a crime involving moral turpitude, 8 U. S. C. § 1182(a)(9), and as he had entered the United States, upon his return from Cuba, without appropriate alien documents. 8 U. S. C. § 1182(a)(20).

After a hearing before a Special Inquiry Officer of the Immigration and Naturalization Service, Marks was ordered deported on the grounds set forth above. The Board of Immigration Appeals sustained the order of deportation.

Marks thereupon petitioned the United States District Court for the Southern District of New York for a writ of habeas corpus, challenging (1) his alleged loss of citizenship, and thus the jurisdiction of the Attorney General in the prior administrative deportation proceedings; (2) his deportability under 8 U. S. C. §§ 1251(a)(1), 1182(a)(9) and 1182(a)(20), even should he be determined to be an alien; and (3) the lawfulness of his detention, should he be declared to be legally deportable, as he would then be stateless and thus not actually deportable to Cuba or to any other country.

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1 Section 349 of the Immigration and Nationality Act of 1952, 8 U. S. C. § 1481, provides in material part:

"(a) From and after the effective date of this chapter a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by—

* * *

(3) entering, or serving in, the armed forces of a foreign state unless, prior to such entry or service, such entry or service is specifically authorized in writing by the Secretary of State and the Secretary of Defense * * *"

After a hearing upon the issues so raised, the district judge ruled that Marks had lost his American citizenship by virtue of serving in the armed forces of Cuba after the successful conclusion of the Castro revolution. Marks appeals from that determination, claiming, as he did below, that the Rebel Army did not constitute the "armed forces of a foreign state", within the meaning of 8 U. S. C. § 1481(a)(3), that his service in the Rebel Army during 1959 and 1960 was involuntary, and that § 1481(a)(3) as here applied is unconstitutional in that it imposes a cruel and inhuman punishment in violation of the Eighth Amendment. Although we find great force in the constitutional arguments presented by relator's counsel, we are constrained by the superior authority of *Perez* v. *Brownell*, 356 U. S. 44 (1948), to affirm the determination of alienage on the opinion of Judge Cashin, the district judge below, 203 F. Supp. 389 (1962).

Despite his determination adverse to the relator on the issue of alienage, Judge Cashin granted the writ of habeas corpus relator sought, for he held that Marks was not deportable under either 8 U. S. C. § 1182(a)(9) or 8 U. S. C. § 1182(a)(20), the provisions relied upon by the Attorney General in the prior deportation proceedings.[2] We hold that the determination of the district court was erroneous in this respect and that the order of deportation was valid.

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2 Having ruled that the order of deportation was invalid, Judge Cashin did not reach the relator's third contention, that his detention was unlawful on the ground that no country would accept him as a stateless deportee and therefore that he was not, in fact, deportable. Marks, who is now at liberty on a bond of $5,000, does not raise the question of his actual deportability upon these cross-appeals. Our disposition of these appeals is, of course, without prejudice to a renewal of that contention upon a new petition for a writ of habeas corpus, should the Attorney General again take the relator into custody.

Section 241 of the Immigration and Nationality Act of 1952, 8 U. S. C. § 1251, provides, in material part, that

> "(a) Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who—
>
> "(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;"

Section 212(a)(20) of the same Act, 8 U. S. C. § 1182 (a)(20), provides for the exclusion from the United States of any alien immigrant

> ". . . who at the time of application for admission is not in possession of a valid unexpired visa, reentry permit, border crossing identification card, or other valid entry document required by this chapter . . ."

It is conceded that Marks possessed none of the documents required of entering alien immigrants at the time of his return to the United States from Cuba in July 1960. Though he had been served with a certificate of loss of American citizenship, he effected entry as a returning native-born citizen who did not need the documents required of alien immigrants. The district judge ruled, however, that §§ 1251(a)(1) and 1182(a)(20) were inapplicable to the novel facts of this case, for he held that inasmuch as, prior to Marks' reentry in 1960, there had been no adjudication of his alienage in any judicial proceeding, no competent determination of Marks' alienage had been made at the time of his entry.

It is clear that when an alleged alien claims United States citizenship and supports his claim by substantial

evidence, he is entitled by the due process clause of the Fifth Amendment to have his American citizenship *vel non* determined by a judicial tribunal. *Ng Fung Ho White*, 259 U. S. 276 (1922); *Perez* v. *Brownell, supra; Kessler* v. *Strecker*, 307 U. S. 22 (1939). It is equally clear that Congress sought by the enactment of Section 356 of the Immigration and Nationality Act of 1952, 8 U. S. C. § 1488, to have loss of nationality occur immediately upon the commission of expatriating acts:

> "The loss of nationality under this Part shall result solely from the performance by a national of the acts or fulfillment of the conditions specified in this Part."

See Hearings Before the Committee on Immigration and Naturalization on H. R. 6127, House of Representatives, 76th Cong. 1st Sess. (1940) at 504; *Kennedy* v. *Mendoza-Martinez*, U. S. , 83 S. Ct. 554 (1963). To accommodate the intent of Congress, therefore, Judge Cashin's determination of alienage must be interpreted to relate to the time of Marks' service in Cuba's Armed Forces unless such an application of § 356 is constitutionally prohibited.

We find no such prohibition. Were deportation under 8 U. S. C. §§ 1251(a)(1) and 1182(a)(20) a punishment for entry into the country in knowing violation of alien documentation requirements, the imposition of such a penalty based upon a post-entry determination of alienage would surely involve fundamental unfairness. Deportation under these statutory provisions is not a penalty for wrongdoing, however, but is rather the delayed exercise of the congressional power to exclude aliens from entry into the United States.

If Marks lost his American citizenship by virtue of service in the Cuban Armed Forces, as we are constrained

to hold that he did, he became an alien in 1959 at the time the expatriating acts were committed, not at the time his alienage was judicially determined. Marks thereafter entered the United States without the documentation required of alien immigrants and is, on that ground, subject to deportation under 8 U. S. C. §§ 1251 and 1182(a)(20).[3]

The judgment of the district court is reversed, and the cause is remanded with instructions that the writ of habeas corpus be dismissed.

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3 Because of our determination that the order of deportation was valid under § 1182(a)(20), we do not reach the question whether Marks was also deportable under 8 U. S. C. § 1182(a)(9), as the Attorney General contends, by virtue of a prior criminal conviction.